

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT ANDREW POIZNER,
Petitioner,
v.
SCOTT FRAUENHEIM, et al.,
Respondents.

Case No.: 14cv1614 LAB (RBB)

ORDER:

**(1) DENYING PETITION FOR WRIT
OF HABEAS CORPUS; and**

**(2) DENYING CERTIFICATE OF
APPEALABILITY**

I. INTRODUCTION

Petitioner Robert Andrew Poizner, a state prisoner represented by counsel, has filed a First Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (“Petition”) challenging his convictions in San Diego County Superior Court Case No. SCD230891 for committing lewd and lascivious acts with a child, committing lewd acts on a child, sexual battery, exhibiting harmful matter to a minor, distributing or exhibiting harmful matter to a child, contributing to the delinquency of a minor, dissuading a

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1 witness, and disobeying a court order. (Pet., ECF No. 12.)¹ Poizner raises fourteen
2 claims in the petition he has filed in this Court.

3 The Court has read and considered the Petition [ECF No. 12], the Answer and
4 Memorandum of Points and Authorities in Support of the Answer [ECF No. 19],
5 Petitioner's Traverse [ECF No. 22], the Supplemental Answer [ECF No. 28], the
6 Supplemental Traverse [ECF No. 29], the lodgments and other documents filed in this
7 case, and the legal arguments presented by both parties. For the reasons discussed below,
8 the Court **DENIES** the petition and **DENIES** a Certificate of Appealability.

9 **II. FACTUAL BACKGROUND**

10 This Court gives deference to state court findings of fact and presumes them to be
11 correct; Petitioner may rebut the presumption of correctness, but only by clear and
12 convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parle v. Fraley*,
13 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences
14 properly drawn from these facts, are entitled to statutory presumption of correctness).
15 The following facts are taken from the California Court of Appeal opinion:

16 In 2009, Poizner was a volunteer counselor at Pacific Health Systems,
17 a substance abuse rehabilitation center. There, he introduced himself to and
18 befriended adolescent boys who were attending Alcoholics Anonymous
19 (AA) and other group meetings, telling one of the boys he was there to help
20 keep himself sober and assist other teenage boys. He then brought the boys
21 to his apartment where he committed acts summarized below and for which
22 he was convicted of the above-referenced offenses. At trial, each victim
23 testified about Poizner's conduct and touching, and the circumstances that
24 otherwise led to the charges against him. Like Poizner's opening brief, our
25 factual summary focuses mainly on the evidence supporting the felony
26 sexual assault offenses against Austin G., Brandon P., Evan W., and
27 Andrew D.

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¹ Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the Court's electronic case filing system, except for lodgments.

Counts 1-8: Austin G.

In September 2009, Poizner agreed to become the AA sponsor of then 13-year-old Austin G. One night after an AA meeting, Poizner obtained Austin's parents' permission to take Austin out for coffee. Afterwards, Poizner took Austin back to his apartment, where he put on an adult pornographic movie for Austin to watch and gave him cigarettes. Poizner sat on a couch next to Austin and at some point began to touch Austin's genitals over his clothing, then underneath his clothing. Poizner offered to orally copulate Austin but then resisted, telling Austin it would be "awkward" since he was Austin's sponsor. Poizner asked Austin to show him his penis, and Austin did so by unbuttoning his pants. Poizner also kissed Austin on his buttocks. Austin and Poizner eventually left the apartment in Poizner's car, where Poizner again rubbed Austin's genitals over his clothing. When Poizner returned Austin home, he told Austin's mother he was gay, but that he was into stable, committed relationships and not interested in teenagers or boys. Austin did not tell his mother what had happened because he was in shock and did not want anyone to know about it.

Three days later, Austin's mother dropped Austin off to meet Poizner at a comedy club. About an hour and a half later, they went back to Poizner's apartment, where Poizner again put on pornography, pulled down Austin's pants and began rubbing Austin's genitals. Poizner also rubbed himself over his clothing, and then asked whether Austin wanted to be orally copulated. Again, Poizner refrained, acknowledging his role as Austin's sponsor. Austin pulled up his pants, they smoked cigarettes, and Poizner took him home. On the way, Poizner told Austin not to tell anyone about what had happened.

At trial, the People played for the jury a tape-recorded pretext call between Austin and Poizner, in which Austin talked about what had happened. Poizner asked Austin if he was angry at him, and told him "that shit's never happened again." Austin asked Poizner to not touch him on his genitals if they ever went out again, and Poizner responded with incriminating statements, saying it would "never again" happen and his touching Austin "was just like something that just kind of happened"

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1 *Counts 11-18: Brandon P.*

2 In May 2009, Poizner became Brandon P.'s sponsor at Pacific Health
3 Systems. Brandon P. was 13 years old at the time. Brandon began going
4 to Poizner's apartment where he would spend the night on Poizner's
5 mattress on the floor, sometimes with other friends, including Austin.
6 Poizner usually slept on the mattress or on a couch in his bedroom. He
7 would buy Brandon cigarettes, and also let him watch adult heterosexual
8 pornographic videos.

9 Sometimes before or after showing the videos, Poizner would massage
10 Brandon's back or feet, and sometimes the feet of the other boys.
11 Sometimes he would hug Brandon and kiss him on the neck, usually when
12 Brandon was leaving. On about 10 or 15 occasions in late 2009, Poizner
13 spanked Brandon, sometimes pulling down his pants and exposing his
14 buttocks and lightly spanking him, and sometimes having Brandon bend
15 over his knee. Poizner also spoke about his sex life with Brandon while
16 they were alone, telling Brandon about other men he had sex with, and
17 describing oral sex. Poizner once jokingly offered to enter the shower while
18 Brandon was showering. Brandon saw that Poizner touched himself in his
19 groin area while the pornography was playing. On two different occasions,
20 Poizner tapped Brandon's penis with the back of his hand, once over
21 Brandon's clothes and another time after quickly pulling down Brandon's
22 boxers. Brandon testified that while he was still 13 years old, Poizner had
23 massaged his back and neck about five times, and had hugged and kissed
24 him a couple of times.

25 When the allegations of Poizner's molestations began to surface,
26 Poizner called Brandon and told him to avoid speaking with an
27 investigating detective. Poizner picked Brandon up at school that day to
28 prevent him from seeing the detective.

1 *Count 19: Andrew D.*

2 Andrew D. was a school friend of Brandon's, and got to know Poizner
3 through Brandon. He went to Poizner's house with Brandon and another
4 friend, Colten. They rented a regular movie and at some point, Poizner
5 massaged Andrew's feet. Andrew fell asleep in Poizner's bed wearing his
6 shirt and boxer shorts. Colten slept in the same bed. When Andrew awoke,
7 an adult heterosexual pornographic movie was playing on the television,
8 and Poizner, Andrew and Colten watched it for about a half an hour.

1 *Counts 20-23: Evan W.*

2 Evan W., who was twelve years old at the time of trial, was another
3 school friend of Brandon's and met Poizner through Brandon. One night,
4 Evan called Poizner, who picked him up in Encinitas and took him
5 downtown where they ate and walked around, and eventually ended up at
6 Poizner's apartment. Evan and Poizner watched a movie, and Evan
7 consumed most of an alcoholic drink that Poizner had purchased for him.
8 Evan was lying on Poizner's bed over the covers but got sick and passed
out, awaking to find himself under the covers with adult heterosexual
pornography on the television.

9 Evan estimated he spent the night at Poizner's apartment about 10
10 times. Poizner always gave Evan cigarettes. Evan, along with his friend
11 Stephen, spent a third night at Poizner's apartment after Christmas of 2009,
12 and drank another alcoholic beverage. On this occasion, Poizner used a
13 belt to spank both Stephen and Evan on their bare buttocks multiple times,
joking that it was to punish them for going out and needing a ride. Evan
laughed, though Evan did not want Poizner to spank him.

14 On the fourth night Evan spent at Poizner's apartment, Poizner
15 massaged Evan's back underneath his shirt, and eventually slipped his
16 hands into Evan's pants and massaged his penis. Evan also recalled
17 spending the night at a hotel with Poizner and other boys on more than one
18 occasion. Poizner would give the boys foot massages and once kissed
Evan's foot.

19 Poizner told Evan not to tell anyone about coming to his apartment
20 and drinking or the fact that Poizner had touched him. He told Evan not to
21 speak about his arrest and that Evan did not have to answer questions from
the police.

22 *Testimony of Brandon P.'s Friends*

23 Colten A., Deon D., Erick N., Tyler M., and Gabriel G. were
24 Brandon's friends who all at some point visited Poizner's apartment. On
25 one occasion there, Colten A. fell asleep and awoke to find a pornographic
26 video playing and Poizner, who was only a few inches away from him,
27 looking at him and Brandon. He became concerned when he noticed most
28 of his fly was unbuttoned though it had been closed when he fell asleep.

1 While at Poizner's apartment, Deon D. saw Poizner give Gabriel G. a
2 kiss. Deon also observed that Poizner was always talking about sex, gave
3 Brandon a back massage on one occasion, and once bet him and other
4 friends that Brandon had a bigger penis than them.

5 Erick N. smoked hookah and cigarettes given to him by Poizner at
6 Poizner's apartment. Poizner once massaged Erick's feet at a hotel and on
7 one occasion kissed him on the neck. Poizner asked Erick about
8 masturbation and talked about girls giving Erick oral sex while touching
9 Erick on his inner thigh near his groin, making Erick feel uncomfortable.

10 Poizner offered Gabriel G. cigarettes and offered to show him and
11 others pornographic videos. When allegations against Poizner surfaced, he
12 called Gabriel and discouraged him from telling anyone he had gone to
13 Poizner's apartment, and told him to come up with a "really good alibi."
14 According to Gabriel, Poizner claimed Brandon's father was trying to make
15 false accusations. He also discouraged Gabriel from saying anything to
16 police.

17 *Testimony of James Araway*

18 In November of 2005, James Araway, who had turned 18 years old
19 the month before, was stationed in the military in San Diego, and met
20 Poizner when Poizner offered to give him a ride back to his base. They
21 exchanged numbers and Araway called Poizner to meet and "hang out."
22 Eventually, they ended up at Poizner's house where Araway drank alcohol
23 and they watched movies. After the first visit, Araway spent several nights
24 at Poizner's house drinking and watching pornographic movies. Araway
25 slept on the couch in the living room and Poizner slept in his bedroom. On
26 one occasion, Poizner gave Araway a back massage. On another occasion
27 while they were watching pornography, Poizner, who had told Araway he
28 was bisexual, gave Araway a "weird look," causing Araway to feel
awkward. Araway asked to be taken back to his ship because he did not
know what Poizner was planning on doing.

Evidence of Poizner's Journal Entries

Before trial, the court considered the People's motion to admit a
number of writings found in Poizner's home, including journal entries
Poizner admitted writing describing his actions on different occasions with
respect to two individuals identified as "James" and "Homeboy." The trial

1 court heard extensive argument concerning the writings and excluded some
 2 as reflecting dissimilar conduct that was highly prejudicial. However,
 3 expressly conducting a section 352 analysis and inferring that the entry
 4 about “James” referred to James Araway, the court concluded that the two
 5 journal entries regarding James and Homeboy reflected recent conduct –
 6 including fondling, spanking, and showing the subjects pornography at
 7 Poizner’s house – that was sufficiently similar to the charged misconduct
 8 to give them a high degree of relevance on the issues of Poizner’s
 9 propensity and intent, as well as corroborating the victims’ testimony.

10 At trial, the journal entries were read into evidence by a prosecution
 11 investigator. The entry concerning “James” began, “Dear James,” then
 12 Poizner wrote that he had fondled James while he was sleeping, he had
 13 apologized to James about it but lied about why he did it, he was working
 14 through his “sexual acting out through S.C.A. and the 10th Step,” and
 15 offered to “make things right.” The reverse side of the writing stated:
 16 “10th Step. Last night I fondled this guy James while he was sleeping on
 17 my couch. He had nowhere else to go. I decided to do it. Not . . . it would
 18 affect him or not [sic]. He woke up startled.” In the Homeboy entry,
 19 Poizner described various sexual acts he and Homeboy had engaged in,
 20 including oral copulation, masturbation and spanking, at times while
 21 watching pornography. Poizner wrote that he was Homeboy’s AA sponsor
 when Homeboy was 17 years old, and that he had to personally observe
 Homeboy’s drug testing, which necessitated watching him urinate. Poizner
 described fantasizing about Homeboy’s penis and orally copulating him.
 Poizner also described how, on the night of Homeboy’s 18th birthday, he
 came to Poizner’s house where Poizner massaged him over his genital area
 and on his buttocks, and with his consent, spanked him on his bare buttocks
 “for his birthday” Poizner wrote that he recalled “possibly smacking
 [Homeboy’s] ass a couple of times before, jokingly, before he was 18, I
 think once.”

22 (Lodgment No. 6 at 3-10.)

23 **III. PROCEDURAL BACKGROUND**

24 On November 19, 2010, the San Diego County District Attorney’s Office filed a
 25 consolidated amended information charging Robert Andrew Poizner with ten counts of
 26 lewd acts on a child, a violation of California Penal Code (Penal Code) § 288(a) (counts
 27 one through six, nine through ten, and twenty-two through twenty-three), three counts of
 28 distributing harmful matter to a minor with the intent to seduce, a violation of Penal Code

§ 288.2(a) (counts seven, eight, and fifteen), four counts of lewd acts on a child of fourteen or fifteen years, a violation of Penal Code § 288(c)(1) (counts eleven through fourteen), three counts of distributing or exhibiting harmful matter to a minor, a violation of Penal Code § 313.1(a) (counts sixteen, nineteen, and twenty-seven), four counts of contributing to the delinquency of a minor, a violation of Penal Code § 272(a)(1) (counts seventeen, twenty, twenty-one, and twenty-four), two counts of attempting to dissuade a witness, a violation of Penal Code § 136.1(a)(2) (counts eighteen and twenty-five), and two counts of disobeying a court order, a violation of Penal Code § 166(a)(4) (counts twenty-six and twenty-eight). (Lodgment No. 1, vol. 1 at 0024-35.) As to counts one through six, nine, ten, twenty-two, and twenty-three, the information also alleged the offenses were committed against more than one victim, within the meaning of Penal Code §§ 667.61(b)(c)(e) and 1203.066(a)(7). (*Id.*) The information also alleged as to counts two, five, twenty-two, and twenty-three, that Poizner had substantial sexual contact with two of his victims, within the meaning of Penal Code § 1203.066(a)(8), and as to counts two and five, that Poizner “used matter depicting sexual conduct,” within the meaning of Penal Code § 1203.066(a)(9). (*Id.*) Finally, the information alleged that Poizner had attempted to dissuade a witness, counts eighteen and twenty-five, while out of custody on bail, within the meaning of Penal Code § 12022.1(b). (*Id.*) The Penal Code § 1203.066(a)(8) allegation associated with counts twenty-three and twenty-four were dismissed after trial had begun.² (*See id.* at 0034.)

Following a jury trial, Poizner was convicted of counts one through eight, count twelve, and counts fourteen through twenty-eight. (Lodgment No. 1, vol. 2 at 0307-46.) The jury also found all the allegations associated with those counts to be true. (*Id.*) The jury found Poizner not guilty of counts nine through eleven and thirteen. (*Id.* at 0319-23, ///

² An amended consolidated information (a “clean” copy of the information, reflecting the dismissed counts and factual changes made based on the evidence presented at trial) was filed on January 27, 2011, the final day of trial. (Lodgment No. 1, vol. 1 at 0116-171.)

0321.) He was sentenced to seventy-five years-to-life plus seven years in prison.
(Lodgment No. 1, vol. 2 at 0264.)

Poizner appealed his convictions to the California Court of Appeal for the Fourth Appellate District, Division One. (Lodgment Nos. 3-5.) The state appellate court affirmed his convictions in a written opinion.³ (Lodgment No. 6.) Poizner then filed a petition for review in the California Supreme Court. (Lodgment No. 7.) The California Supreme Court denied the petition for review without citation of authority. (Lodgment No. 8.)

Next, Poizner filed a petition for writ of habeas corpus in the San Diego Superior Court. (Lodgment No. 9.) The superior court denied the petition without prejudice in a written opinion. (Lodgment No. 10.) A subsequent habeas corpus petition filed in the California Court of Appeal was denied in a written opinion as well. (Lodgment No. 11.) Finally, Poizner filed a petition for review of the appellate court's denial of his writ of habeas corpus in the California Supreme Court. (Lodgment No. 12.) That petition was denied without citation of authority. (Lodgment No. 13.)

Poizner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court on July 7, 2014, and a First Amended Petition on November 13, 2014. (ECF Nos. 1, 12.) Respondent filed an Answer and Memorandum in Support of the Answer on February 11, 2015. (ECF No. 19.) Poizner filed a Traverse on February 25, 2015. (ECF No. 12.) Pursuant to an Order by this Court, Respondent filed a Supplemental Answer on September 17, 2015, and Poizner filed a Supplemental Traverse on September 24, 2015. (ECF Nos. 28-29.)

IV. DISCUSSION

Poizner raises fourteen claims in his Petition. First, he claims newly discovered evidence proves his factual innocence. (Pet. at 36-47.) Second, Poizner contends there

³ The court of appeal modified the abstract of judgment to correctly reflect the Penal Code sections of which Poizner was convicted in counts eighteen and twenty-five. (Lodgment No. 6 at 36-37.)

1 was insufficient evidence to support his convictions in counts twelve and fourteen
2 because the prosecution did not prove Poizner's age. (*Id.* at 48-50.) Third, Poizner argues
3 the trial court improperly prevented him from admitting character evidence, violating his
4 federal constitutional right to present a defense. (*Id.* at 51-64.) Fourth, Poizner contends
5 the trial court's jury instructions on the allegations lowered the burden of proof on the
6 prosecution. (*Id.* at 65-72.) Fifth, Poizner claims his sentence amounts to cruel and
7 unusual punishment. (*Id.* at 73-78.) Sixth, Poizner argues the admission of uncharged
8 acts violated his due process and fair trial rights. (*Id.* at 79-95.) Seventh, Poizner
9 contends the trial court should have instructed the jury on California's corpus delicti rule.
10 (*Id.* 96-97.) Eighth, Poizner claims the trial court improperly admitted evidence of
11 spanking as propensity evidence. (*Id.* 98-99.) Ninth, Poizner argues the trial court
12 erroneously permitted the charged crimes to be admitted as propensity evidence. (*Id.*
13 100-01.) In claims ten and eleven, Poizner contends the trial court improperly admitted
14 evidence of his sexual orientation, consensual homosexual activity, and possession of
15 homosexual pornography. (*Id.* at 102-10.) In claim twelve, Poizner argues the
16 cumulative effect of the errors committed at his trial violated his federal constitutional
17 right to a fair trial. (*Id.* at 111-13.) Poizner also contends that trial counsel rendered
18 ineffective assistance when he failed to obtain victim Brandon's psychiatric records, and
19 failed to present character witnesses (claim thirteen). (*Id.* at 46-47, 62-63, 94-95, 97.) In
20 addition, Poizner claims appellate counsel was ineffective for failing to raise the
21 following issues on appeal: (1) trial counsel's failure to present character witnesses; (2)
22 the trial court's improper reasonable doubt instructions; and (3) Poizner's sentence
23 violates the Eighth Amendment's prohibition against cruel and unusual punishments
24 (claim fourteen). (*Id.* at 63-64, 72, 78.)

25 Respondent contends claims two, three, four and five are procedurally defaulted.
26 Respondent also contends that there is no cognizable freestanding claim of actual
27 innocence, and, in any event, Poizner has failed to show he is actually innocent. (Mem.
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1 of P. & A. Supp. Answer at 21-26.) As to the remaining claims, Respondent contends
 2 they fail on the merits. (*Id.* at 26-50.)

3 A. Procedural Default

4 Respondent contends that claims two, three, four and five are procedurally
 5 defaulted because the state appellate court imposed the procedural bars of *In re Dixon*, 41
 6 Cal.2d 756, 759 (1953) and *In re Lindley*, 29 Cal. 2d 709, 723 (1947) on those claims in
 7 its opinion denying the habeas corpus petition Poizner filed in the California Court of
 8 Appeal. The state appellate court imposed *Dixon* and *Lindley* because the claims could
 9 have been raised on appeal but were not. (Mem. of P. & A. Supp. Answer at 27, 31, 35,
 10 38; Lodgment No. 11 at 2-4.) The California Supreme Court denied the petition for
 11 review Poizner filed seeking to challenge the state appellate court's denial of the claims
 12 without citation of authority, and thus this Court must presume the California Supreme
 13 Court's denial rests upon the same ground as the appellate court's. *Ylst*, 501 U.S. at 803.

14 The Ninth Circuit has held that because procedural default is an affirmative
 15 defense, Respondent must first "adequately [plead] the existence of an independent and
 16 adequate state procedural ground" *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.
 17 2003). In order to place the defense at issue, Poizner must then "assert[] specific factual
 18 allegations that demonstrate the inadequacy of the state procedure" *Id.* The
 19 "ultimate burden" of proving procedural default, however, belongs to the state. *Id.* If the
 20 state meets its burden under *Bennett*, federal review of the claim is foreclosed unless
 21 Poizner can "demonstrate cause for the default and actual prejudice as a result of the
 22 alleged violation of federal law, or demonstrate that failure to consider the claims will
 23 result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750
 24 (1991).

25 1. Independence and Adequacy

26 A state procedural rule is "independent" if the state law basis for the decision is not
 27 interwoven with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983); *Harris*
 28 *v. Reed*, 489 U.S. 255, 265 (1989). A ground is "interwoven" with federal law if the state

1 has made application of the procedural bar depend on an antecedent ruling on federal law
 2 such as the determination of whether federal constitutional error has been committed.
 3 *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). “To qualify as an ‘adequate’ procedural
 4 ground, a state rule must be ‘firmly established and regularly followed’.” *Walker v.*
 5 *Martin*, 562 U.S. 307, 316 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 60, 130 S. Ct.
 6 612, 618 (2009).) All cases cited by a state court must be independent and adequate to
 7 bar federal review of the claims. *Washington v. Cambra*, 208 F.3d 832, 834 (9th Cir.
 8 2000).

9 The Ninth Circuit has found *Lindley* to be an independent and adequate state
 10 procedural bar. *Carter v. Giurbino*, 385 F.3d 1184, 1197-98 (9th Cir. 2004). The
 11 analysis for the *Dixon* procedural bar, however, is more complex.

12 In *In re Robbins*, 18 Cal. 4th 770 (1998) the California Supreme Court stated that it
 13 would no longer consider federal law when denying a habeas claim as procedurally
 14 barred under *In re Clark*, 855 P.2d 729 (1993) or *Dixon*. *Robbins*, 18 Cal. 4th at 815, fn.
 15 34. *Clark* embodies California’s untimeliness bar, while *Dixon* stands for the proposition
 16 that “habeas corpus cannot serve as a substitute for appeal,” and thus habeas corpus relief
 17 is not available in California for claims that could have been but were not raised on
 18 appeal. *Dixon*, 41 Cal. 2d at 759. *Bennett*, 322 F.3d at 582-82; *see also Park v.*
 19 *California*, 202 F.3d 1146, 1156 (9th Cir. 2000). The Ninth Circuit has not specifically
 20 concluded that a post-*Robbins* application of the *Dixon* rule is independent of federal law.
 21 The *Bennett* court’s analysis of the independence of *Clark*, however, compels the same
 22 result for claims barred pursuant to *Dixon*. The pre-*Robbins* application of the two
 23 procedural bars was similar in that the invocation of either *Dixon* or *Clark* required the
 24 state court to determine if there existed fundamental constitutional error that would
 25 excuse the petitioner’s default, and such an analysis necessarily involved the
 26 consideration of federal law. *Bennett*, 322 F.3d at 581-82; *see also LaCrosse v. Kernan*,
 27 244 F.3d 702, 707 (9th Cir. 2001) (observing that consideration of federal law in barring
 28 claims as pretermitted is “analogous” to consideration of federal law in barring claims as

untimely). Furthermore, in *Protsman v. Pliler*, 318 F. Supp. 2d 1004, 1007-08 (S.D. Cal. 2004), a Judge of this Court found a post-Robbins application of *Dixon* to be independent of federal law, and this Court agrees with the reasoning of that conclusion.

The Ninth Circuit has also not specifically found *Dixon* to be adequate. But *Bennett* only requires Respondent at the initial stage to “affirmatively [plead] that [the *Dixon*] bar is independent and adequate. *Bennett*, 322 F.3d at 586. Respondent has done so. (See Mem. of P. & A. Supp. Answer at 20.) Further, the page of *Dixon* cited by the state appellate court in its opinion denying Poizner’s petition refers to California’s rule that claims that “habeas corpus cannot serve as a substitute for appeal,” and thus habeas corpus relief is not available in California for claims that could have been but were not raised on appeal. *Dixon*, 41 Cal. 2d at 759. Given that the Ninth Circuit has determined that *Lindley*, which stands for the proposition that “habeas corpus is [not] an available remedy to review the rulings of the trial court with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring [during] the trial,” *Lindley*, 29 Cal. 2d at 723, Respondent has met his initial burden under *Bennett* to establish that *Dixon* is an independent state procedural bar. *Bennett*, 322 F.3d at 586.

2. Petitioner’s Burden

The burden now shifts to Poizner to “assert[] specific factual allegations that demonstrate the inadequacy of the state procedure” *Bennett*, 322 F.3d at 586. Poizner did not address the independence or adequacy of the *Dixon* bar in his Traverse. (See Traverse.) After the Traverse was filed, the Ninth Circuit decided *Lee v. Jacquez*, 788 F.3d 1124 (9th Cir. 2014) (*Lee III*), and the Court directed the parties to file supplemental briefs addressing the application of *Lee III* to this case. (See Order dated July 10, 2015, ECF No. 24.)

In the Supplemental Answer, filed before Poizner filed his Supplemental Traverse, Respondent argues Poizner has not satisfied his burden at the second stage of *Bennett*, and because *Lee III* addresses only the third stage of *Bennett*, *Lee III* is inapposite. (See Supp. Answer at 3-6.) Respondent also notes that under Ninth Circuit authority, the

1 Court may choose to address the merits of Poizner's claims if it is in the interests of
2 judicial economy. (*Id.* at 6.)

3 In his Supplemental Traverse, Poizner alleges the *Dixon* bar is not adequate
4 because at the time the California Court of Appeal denied Poizner's direct appeal in
5 2012, the California Supreme Court cited *Dixon* in about ten percent of its denials of
6 habeas corpus petitions during a week-long period between February 24, 2012 and March
7 9, 2012. (Supp. Traverse at 5, Ex. B.) Poizner contends that "[b]ecause a much, much
8 larger percentage of primarily non-capital habeas petitions would likely have included
9 record-based claims, the sparsity of citation to *Dixon* reveals clear lack of consistency
10 and regularity in the application of the bar." (Supp. Traverse at 5.)

11 In *Lee v. Jacquez*, 406 Fed. Appx. 148 (9th Cir. 2011) (*Lee I*), Lee appealed the
12 district court's conclusion that several of her claims were procedurally defaulted under
13 *Dixon*. The district court's ruling was based on its erroneous belief the Ninth Circuit had
14 determined *Dixon* was an independent and adequate state procedural bar. *Id.* at *150.
15 After Lee presented evidence challenging the independence and adequacy of *Dixon* on
16 appeal, the Ninth Circuit remanded the case back to the district court for consideration of
17 Lee's evidence, which consisted of a list of 210 habeas corpus cases denied by the
18 California Supreme Court on December 21, 1999, six months after Lee's default, only ten
19 percent of which were denied by invoking *Dixon*. *Id.*; *Lee v. Mitchell*, 2012 WL
20 2194471 (*Lee II*) at *13-*14 (C.D. Cal. May 1, 2012). Lee contended that "[b]ecause a
21 much, much larger percentage of primarily non-capital habeas petitions would likely have
22 included record-based claims, the sparsity of citation to *Dixon* reveals clear lack of
23 consistency and regularity in the application of the bar." *Lee II* at *13. The petitioner in
24 *Lee II* also cited federal cases in which the federal court had found *Dixon* to be
25 inadequate. On remand, the district court again concluded *Dixon* was independent and
26 adequate and rejected the petitioner's evidence to the contrary. *Id.* at *19-*20.

27 Lee appealed again. The Ninth Circuit found that Lee had met her burden of
28 putting the adequacy of *Dixon* at issue, and the burden had shifted to the Respondent to

1 establish *Dixon*'s adequacy. *Lee III*, 788 F.3d at 1129. The Court first rejected
 2 Respondent's argument that *Walker* was dispositive of *Dixon*'s adequacy. *Id.* at 1129-31.
 3 Respondent also presented evidence that *Dixon* was adequate because it had been applied
 4 in approximately twelve percent of all habeas denials, which Respondent characterized as
 5 "a 'predicable' application." *Id.* at 1133. The Court ultimately rejected as "entirely
 6 insufficient" Respondent's evidence because it showed only the number of times the
 7 *Dixon* was actually applied as opposed to the number of times it should have been
 8 applied. *Id.* "Logic dictates that in order to know if invoking *Dixon* in twelve percent of
 9 all cases shows consistent application, we need to know 'the number of times that claims
 10 to which the *Dixon* rule could apply were instead rejected on the merits.' [Citation
 11 omitted]." *Id.*

12 The evidence presented by Poizner establishing the inadequacy of *Dixon* is
 13 essentially the same as that presented to the district court in *Lee II*. The Ninth Circuit
 14 concluded the petitioner in *Lee II* had met her burden under Bennett. *See Lee III*, 788
 15 F.3d at 1129 (stating "our previous remand in this case suggests that Lee has met her
 16 burden of putting the adequacy of the *Dixon* rule at issue"). Accordingly, this Court
 17 concludes Poizner has met his burden at the second stage of *Bennett*. The burden shifts
 18 back to the Respondent. *Bennett*, 322 F.3d at 586.

19 3. Respondent's Burden

20 Respondent has not presented this Court with any further evidence of *Dixon*'s
 21 adequacy, and thus Poizner's claims are not procedurally defaulted. *Bennett*, 522 F.3d at
 22 586. The Court will address the merits of Poizner's claims.

23 B. Merits — Standard of Review

24 In addition to imposing procedural bars on Poizner's claims, the state appellate
 25 court addressed the merits of those claims. Respondent also briefed the merits of
 26 Poizner's claims, and, as discussed below, Poizner is not entitled to relief as to any
 27 claims.

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1 This Petition is governed by the provisions of the Antiterrorism and Effective
 2 Death Penalty Act of 1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320 (1997).
 3 Under AEDPA, a habeas petition will not be granted with respect to any claim
 4 adjudicated on the merits by the state court unless that adjudication: (1) resulted in a
 5 decision that was contrary to, or involved an unreasonable application of clearly
 6 established federal law; or (2) resulted in a decision that was based on an unreasonable
 7 determination of the facts in light of the evidence presented at the state court proceeding.
 8 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner’s
 9 habeas petition, a federal court is not called upon to decide whether it agrees with the
 10 state court’s determination; rather, the court applies an extraordinarily deferential review,
 11 inquiring only whether the state court’s decision was objectively unreasonable. *See*
 12 *Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th
 13 Cir. 2004).

14 A federal habeas court may grant relief under the “contrary to” clause if the state
 15 court applied a rule different from the governing law set forth in Supreme Court cases, or
 16 if it decided a case differently than the Supreme Court on a set of materially
 17 indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant
 18 relief under the “unreasonable application” clause if the state court correctly identified
 19 the governing legal principle from Supreme Court decisions but unreasonably applied
 20 those decisions to the facts of a particular case. *Id.* Additionally, the “unreasonable
 21 application” clause requires that the state court decision be more than incorrect or
 22 erroneous; to warrant habeas relief, the state court’s application of clearly established
 23 federal law must be “objectively unreasonable.” *See Lockyer v. Andrade*, 538 U.S. 63, 75
 24 (2003). The Court may also grant relief if the state court’s decision was based on an
 25 unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2).

26 Where there is no reasoned decision from the state’s highest court, the Court
 27 “looks through” to last reasoned state court decision and presumes it provides the basis
 28 for the higher court’s denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797,

805-06 (1991). If the dispositive state court order does not “furnish a basis for its reasoning,” federal habeas courts must conduct an independent review of the record to determine whether the state court’s decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at 8. “[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]” *id.*, the state court decision will not be “contrary to” clearly established federal law. *Id.* Clearly established federal law, for purposes of § 2254(d), means “the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Andrade*, 538 U.S. at 72.

C. Newly Discovered Evidence/Factual Innocence (Ground One)

In his first claim, Poizner contends that newly discovered evidence establishes he is actually and factually innocent of the crimes of which he was convicted. (Pet at 35-46; Traverse at 3-10.) As support for this claim, Poizner contends that the filing of a civil lawsuit by Austin and Brandon against Pacific Health Systems shows they had a financial motive for lying at trial. Poizner also claims that in depositions related to the civil lawsuit, two of Brandon’s therapists testified Brandon denied Poizner molested him, Brandon admitted sexually assaulting a girl, stealing a car, and having a troubled relationship with his father before meeting Poizner. (Pet. at 35-46; Traverse at 3-10.) Had this information been presented at trial, Poizner contends, he would not have been convicted.

Poizner raised this claim in the petition for review he filed in the California Supreme Court challenging the state appellate courts’ denial of his state habeas corpus petition. (Lodgment No. 12.) The California Supreme Court denied the petition without citation of authority. (Lodgment No. 13.) Thus, this Court must “look through” to the

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1 state appellate court opinion denying the claim. *Ylst*, 501 U.S. at 805-06. The state
2 appellate court analyzed the claim as follows:

3 First, Poizner claims newly discovered evidence proves his innocence.
4 He relies on a post conviction civil action for damages against him and the
5 rehabilitation center filed by two of the boys he molested (Brandon P. and
6 Austin G.) and on the deposition testimony in that action of therapists who
7 testified that Brandon told them he was not molested by Poizner, had a
8 troubled relationship with his father, and was involved in raping a girl.
9 Poizner argues the criminal case against him depended on his accusers'
10 credibility, and this newly discovered evidence proves Brandon and Austin
11 lied at trial because they had a monetary motive to insure Poizner's
12 conviction. Newly discovered evidence does not justify habeas corpus
13 relief unless it completely undermines the entire structure of the case upon
14 which the prosecution was based and points unerringly to the petitioner's
15 innocence or reduced culpability. (*In re Lawley* (2008) 42 Cal.4th 1231,
16 1239; *In re Lindley* (1947) 29 Cal.2d 709, 723.) As this court noted in the
17 opinion deciding Poizner's appeal, the evidence against him was "abundant
18 and strong"; "the victims testified directly, specifically and unequivocally
19 about the offenses"; Austin's testimony "was corroborated by Poizner's
20 own incriminating admissions"; and "[o]ther boys corroborated some of the
21 conduct between Poizner and Brandon." Although the newly discovered
22 evidence may undermine the credibility of Austin and Brandon, their
23 credibility was a main issue at trial, and "[e]vidence relevant only to an
24 issue already disputed at trial, which does no more than conflict with trial
25 evidence, does not constitute 'new evidence' that fundamentally
26 undermines the judgment." (*In re Clark* (1993) 5 Cal.4th 750, 798, fn.
27 33.)

28 (Lodgment No. 11 at 2.)

As Respondent correctly notes, whether a freestanding "actual innocence" claim is
cognizable under federal habeas law is an open question. *See District Att'ys Office for*
Third Judicial Dist. v. Osborne, 557 U.S. 52, 71-72 (2009); *House v. Bell*, 547 U.S. 518,
554-55 (2006); *Herrera v. Collins*, 506 U.S. 390, 400-17 (1993). If such a claim does
exist, the Supreme Court has noted a petitioner would have to meet an "extraordinarily
high" and "truly persuasive" showing in order to establish he was actually innocent of the
charges of which he was convicted. *Herrera*, 506 U.S. at 417. The Ninth Circuit has
interpreted this "extraordinarily high" showing to mean a petitioner must do more than

1 raise doubt about the conviction, but rather must show affirmative proof of innocence.
 2 *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997).

3 Given the state of the law, Poizner has not established a claim for relief for two
 4 reasons. First, because the Supreme Court has never squarely held that a free-standing
 5 actual innocence claim exists, the state court's denial of such a claim cannot be contrary
 6 to, or an unreasonable application of, clearly established Supreme Court law. *See Carey*
 7 *v. Musladin*, 549 U.S. 70, 77 (2006); *see also Knowles v. Mirzayance*, 556 U.S. 111, 122
 8 (2009); *Alberni v. McDaniel*, 458 F.3d 860, 866 (9th Cir. 2006) (finding that when the
 9 Supreme Court has expressly stated that whether a particular claim exists is an open
 10 question, the state court cannot be said to have acted in an objectively unreasonable
 11 manner by denying that claim). Thus, Petitioner would be limited to showing the state
 12 court's adjudication of this claim involved an unreasonable determination of the facts in
 13 light of the evidence presented in state court in order to satisfy 28 U.S.C. § 2254(d).

14 Second, even assuming a freestanding actual innocence claim exists, Poizner's
 15 showing falls well short of establishing affirmative proof of innocence or satisfying 28
 16 U.S.C. § 2254(d)(2). Poizner asserts Austin's and Brandon's joint lawsuit against Pacific
 17 Health Systems establishes a "monetary motive to insure Poizner's conviction," and
 18 depositions taken of Brandon's therapists during the course of the lawsuit establish
 19 Brandon lied at trial about Poizner's molestation. (Pet. at 38.) These two pieces of "new
 20 evidence," contends Poizner, deprived him of the ability to thoroughly cross examine
 21 Brandon and Austin at trial, thus casting doubt on the verdicts. In addition, Poizner
 22 contends that evidence of his poor relationship with his father and evidence he
 23 participated in a rape should have been admitted, and that this evidence also establishes
 24 the verdicts in Poizner's case are unreliable.

25 1. *The Civil Lawsuit*

26 It is pure speculation that Austin and Brandon, along with their families, hatched a
 27 plan or scheme to falsely accuse Poizner of molestation for financial gain, committed
 28 perjury to further that plan or scheme, and managed to convince other boys to accuse

1 Poizner of sexual misconduct and commit perjury as well. It is much more probable that
2 Austin and Brandon, through their parents, sought compensation for the damage inflicted
3 upon them by Poizner via the civil action against Pacific Health Systems. It is a
4 reasonable legal tactic for an attorney to wait until criminal proceedings are concluded
5 before filing a civil action in order to ensure any guilty verdict can be used as evidence in
6 the civil lawsuit or a bargaining tool in settlement talks. Moreover, the facts do not
7 support a conclusion that Brandon and Austin conspired to falsely accuse Poizner of
8 molestation for financial gain. Brandon testified Austin was “just another student at the
9 rehab,” and that he was not a close friend of Austin’s. (Lodgment No. 2, vol. 4 at 524.)
10 Brandon also testified he never discussed his own molestation by Poizner with Austin
11 and Austin never told Brandon that Poizner had molested him as well. (*Id.* at 562.)
12 Brandon’s father testified that after finding out about the molestation allegations against
13 Poizner, he did not suggest anything to the parents of Brandon’s friends. (*Id.* at 639.)
14 Moreover, any effect that knowledge of the lawsuit would have had on the jury’s decision
15 is far from clear. It is possible the jury would have viewed the lawsuit as evidence the
16 boys fabricated the accusations against Poizner for financial gain, as Poizner suggests.
17 But it is much more likely the jury would have viewed the lawsuit as further evidence of
18 the crimes Poizner committed and the victims’ desire for compensation.

19 In addition, Austin’s pretext phone call with Poizner also undermines Poizner’s
20 claim. During the phone call, Austin confronted Poizner about Poizner’s actions.
21 Poizner replied that “that’s shit’s never happened again,” and that “if you ever said
22 anything like, like, fuck dude, I’ll fucking go to prison forever.” (Lodgment No. 1, vol. 1
23 at 0136, 0138.) In another exchange, Poizner again reassured Austin that he would not
24 molest him again:

25 AG [AUSTIN]: So you know, if I went out with you, you wouldn’t
26 like be all over my dick and stuff again, right?

27 RP [POIZNER]: Oh, fuck no!
28

1 AG: Alright.

2 RP: No, no, no, no, no. Never, never again, dude. Like that's, that
3 was just like something that just kind of happened and shit. Like . . .

4 (*Id.* at 0138.)

5 Poizner also again told Austin that "if you were ever to say something about
6 it, it would be like, like it would be horrible [so] . . . you would never say anything?"

7 (*Id.* at 0140.) Austin assured that he would not. (*Id.*)

8 In sum, the idea that the accusations against Poizner were fabricated by Brandon
9 and Austin for financial gain finds no support in the record or in the materials submitted
10 by Poizner. Accordingly, they do not support a conclusion that Poizner is actually
11 innocent of the crimes of which he was convicted.

12 2. *Brandon's Denial of Molestation*

13 Poizner also claims Brandon's statements to his therapist establish he lied at trial
14 about Poizner's acts. In support of this claim, Poizner provides two depositions taken
15 during the course of the civil lawsuit filed against Pacific Health Systems, one from
16 psychotherapist Bryan Lepinske, LCSW, who treated Brandon in 2010 while Brandon
17 was at Second Nature, a "multidisciplinary therapeutic wilderness program," and one
18 from Dr. Quinten Harvey, who performed a psychological exam on Brandon in 2010
19 while he was at Second Nature. (Pet'rs Exs. B-C, ECF No. 12.) During the deposition,
20 Lepinske identified a letter written by Brandon to his father in 2010 in which Brandon
21 stated his father had unfairly blamed Poizner, and that "all [Poizner] had ever did for me
22 was care for me." (Pet'rs Ex. B at 18.) When Lepinske was asked whether Brandon had
23 denied Poizner had exhibited any "inappropriate behavior" toward Brandon, Lepinske
24 testified as follows:

25 THE WITNESS: So this this what I – this is what – what I honestly
26 recollect. Based on the question that I hear you asking, you're asking did
27 he at all times categorically deny any inappropriate contact, and what I
28 would say is that he did – the way in which he talked to me about the
dynamics between he and Rob, I recall being concerned there may be what

1 I would consider to be grooming on Rob's part, grooming behavior, which
 2 would be considered to be – and in this context, I was – I became concerned
 3 that Rob may have been grooming Brandon in a – in what I would consider
 to be a psychosexual way.

4 (*Id* at 17.)

5 Lepinske also testified that he had explained the concept of “grooming” to
 6 Brandon. (*Id.* at 18.) The United States Department of Justice's National Sex
 7 Offender Public Website defines “grooming” as follows:

8 Grooming is a method of building trust with a child and adults around the
 9 child in an effort to gain access to and time alone with her/him. However,
 10 in extreme cases, offenders may use threats and physical force to sexually
 11 assault or abuse a child. More common, though, are subtle approaches
 12 designed to build relationships with families. The offender may assume a
 13 caring role, befriend the child, or even exploit their position of trust and
 14 authority to groom the child and/or the child's family. These individuals
 15 intentionally build relationships with the adults around a child or seek out
 a child who may have fewer adults in her/his life. This increases the
 likelihood that the offender's time with the child is welcomed and
 encouraged.

16 The purpose of grooming is:

- 17 • To reduce the likelihood of a disclosure.
- 18 • To reduce the likelihood of the child being believed.
- 19 • To reduce the likelihood of being detected.
- 20 • To manipulate the perceptions of other adults around the child.
- 21 • To manipulate the child into becoming a cooperating participant
 which reduces the likelihood of a disclosure and increases the
 likelihood that the child will repeatedly return to the offender.

22 (See <https://www.nsopw.gov/en>.)

23 Brandon acknowledged Poizner had played pornographic movies for him and had
 24 engaged in other grooming behavior with him, but he denied that Poizner had ever
 25 touched him in a sexually inappropriately way. (Pet's Ex. B at 19, 27.) Lepinske also
 26 testified at the deposition that Brandon told Lepinske he was concerned Poizner had
 27 molested a friend of his, Colten (another of Poizner's victims). (*Id.* at 27) Lepinske

28 ///

1 suspected that despite Brandon's denials it was likely Brandon had been molested by
2 Poizner. (*Id.* at 26.)

3 Dr. Harvey testified that at his initial meeting with Brandon, he denied Poizner had
4 sexually molested him. (Pet'rs Ex. C at 37, 42.) Like Lepinske, Harvey considered the
5 relationship between Poizner and Brandon "a concern that should be continued to be
6 focused on." (*Id.* at 45.) When asked to explain, Harvey stated as follows:

7 Well, not only is it an issue in psychological treatment in general but
8 my experience, specifically. It is not uncommon for those who have been
9 a victim of either sexual exploitation or manipulation, molestation, and
10 abuse that they often conceal or withhold information regarding what took
11 place, for a variety of reasons, and that there seemed to be enough questions
12 here that people were raising a number of questions.

13 It was a relationship that seemed – well, questionable, that at this point
14 there was nothing to substantiate or specifically identify it would have
15 taken place, but there's enough concern here to continue to track and deal
16 with what might be.

17 (*Id.* at 46.)

18 Thus, even though Brandon denied during his therapy sessions that Poizner had
19 molested him, when viewed in context with the therapists' expert opinion, evidence of
20 Brandon's denials would not have assisted Poizner in his defense. Both therapists felt the
21 relationship between Poizner and Brandon was inappropriate and concerned them. If
22 evidence of Brandon's denials had been admitted, the prosecution would have presented
23 expert testimony characterizing Poizner's behavior as "grooming" and explaining the
24 reasons why victims of molestation sometimes deny the molestation occurred. Moreover,
25 contrary to Poizner's claim that none of this evidence was before the jury, Brandon was
26 asked about his time at Second Nature at trial. When he was told about Poizner's arrest
27 while at Second Nature, Brandon told his father and employees of Pacific Health that
28 Poizner had never touched him. (Lodgment No. 2, vol. 4 at 594-95.) When asked why
he had done so, Brandon testified he "wanted it to be that Rob would be safe and that he
would be able to see me still and that I wouldn't have to see my dad." (*Id.* at 605-06.)

1 He told his dad that nothing had happened between him and Poizner because he “wanted
 2 to get [his dad] in trouble for the – for making false accusations.” (*Id.* at 606.) He denied
 3 that his therapists at Second Nature suggested to him that Poizner had molested him and
 4 admitted that when his therapists asked “Did anything honestly ever happen with you
 5 [and Poizner]?” he told them “‘Well, a few touchings, that’s it, but like nothing big.’
 6 That’s what I told them at the time.” (*Id.*)

7 Evidence of Brandon’s denial that Poizner molested him would not have assisted
 8 Poizner in his defense, nor does it establish he is actually innocent of the charges of
 9 which he was convicted. Further, evidence that Brandon had denied Poizner had
 10 molested him during his contact with his therapists at Second Nature was before the jury.
 11 Any further evidence about Brandon’s denials would not have changed the outcome of
 12 the trial in the face of testimony by Brandon and other victims of Poizner.

13 3. *Brandon’s Relationship With His Father*

14 Next, Poizner contends that evidence he had a troubled relationship with his father
 15 prior to meeting Poizner is “new evidence” gleaned from the depositions of Brandon’s
 16 Second Nature therapists. Poizner contends this evidence would have helped establish
 17 Poizner’s actual innocence because Brandon’s father testified Brandon pulled away from
 18 him and started bonding with Poizner, and because the prosecutor argued Poizner pitted
 19 Brandon against his father. (Pet. at 42.) Whether Brandon’s poor relationship with his
 20 father began before or after Brandon met Poizner is a collateral issue that likely had very
 21 little effect on the jury’s decision whether Poizner committed the acts against Brandon
 22 and the other victims. In any event, it was clear from the evidence presented at trial that
 23 Brandon and his father had longstanding difficulties in their relationship. Brandon
 24 testified he got along better with his mother than his father because his father was stricter
 25 and his mother let him do what he wanted. (Lodgment No. 2, vol. 4 at 519-20.)
 26 Brandon’s father testified that prior to Brandon’s entry into the Pacific Health Systems
 27 program, his divorce from Brandon’s mother “had done a number on [Brandon],” that the
 28 divorce “had been difficult for [Brandon],” and that his relationship with Brandon was

1 strained before Brandon entered the Pacific Health Systems program. (*Id.* at 611, 620.)
 2 Brandon's father also testified that Brandon was acting out and using drugs before the
 3 program, and that he was the "tough guy" parent who convinced Brandon's mother to
 4 enter Brandon into the rehab program at Pacific Health Systems. (*Id.* at 620-21.)

5 *4. Brandon's Commission of Crimes of Moral Turpitude*

6 Finally, Poizner contends that evidence Brandon committed a rape and had stolen a
 7 car is also "new evidence" supporting his innocence.⁴ Poizner argues this evidence
 8 would have helped establish his actual innocence because rape is a crime of moral
 9 turpitude and the case turned on credibility. Poizner contends that had evidence of
 10 Brandon's commission of a rape and stealing a car been admitted at trial, he would have
 11 been able to show Brandon lied.⁵ (Pet. at 43-44.)

12 It is true that such information may have served to undermine Brandon's
 13 credibility. But that is not the standard for overturning a conviction on federal habeas
 14 corpus review for actual innocence. As stated above, even if a free standing actual
 15 innocence claim a petitioner would have to make an "extraordinarily high" showing,
 16 meaning a petitioner must do more than raise doubt about the conviction, but rather must
 17 show affirmative proof of innocence. *Herrera*, 506 U.S. at 417; *Carriger*, 132 F.3d at
 18 476. Poizner's showing does not meet that standard. He only presents evidence that may
 19 or may not have cast sufficient doubt on Brandon's testimony.

20 ///

21 ///

22 _____

23 ⁴ Brandon was convicted of joyriding, not auto theft, in that incident. (Pet'rs Ex. C at 39.)

24 ⁵ Poizner also argues that "[b]ecause Poizner did not have the information about Brandon's offenses,
 25 Poizner's constitutional rights to present a defense and to cross-examine witnesses was violated." (Pet.
 26 at 44.) The suppression by the prosecution of impeachment material over which they have sole access
 27 may form the basis for a prosecutorial misconduct claim. *See Brady v. Maryland*, 373 U.S. 83 (1963);
 28 *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). But Poizner does not make that claim here. No action
 by the trial court prevented Poizner's counsel from presenting evidence of the alleged rape and
 joyriding, and thus Poizner's Sixth Amendment rights to present a defense and cross examine witnesses
 were not impinged.

1 5. *Poizner Has Made An Insufficient Showing of Actual Innocence*

2 Assuming there exists a free standing actual innocence claim under the Federal
3 Constitution, none of the “new evidence” presented by Poizner establishes “affirmative
4 proof” of his innocence to satisfy the *Herrera* standard. Poizner presents only
5 speculation and possible additional impeachment material that could have been presented
6 at trial. *See Herrera*, 506 U.S. at 417; *Carriger*, 132 F.3d at 476. Accordingly, the state
7 court’s adjudication of this claim was neither contrary to, nor an unreasonable application
8 of, clearly established Supreme Court law, and was not based on an unreasonable
9 determination of the facts. As such, this claim is **DENIED**.

10 D. Sufficiency of the Evidence of Poizner’s Age (Ground Two)

11 Poizner next contends there was insufficient evidence to establish the age
12 difference requirement for his convictions of Penal Code §288(c)(1) in counts twelve and
13 thirteen. (Pet. at 49-50; Traverse at 18-21.) Respondent contends the claim is
14 procedurally defaulted, and, in any event, lacks merit because Brandon’s opinion of
15 Poizner’s age, coupled with the jury’s perception of Poizner’s appearance, is sufficient
16 under California law to support the jury’s verdict. (Mem. of P. & A. Supp. Answer at 26-
17 29.)

18 Poizner raised this claim in the petition for review from the denial of his state
19 habeas corpus petition, which he filed in the California Supreme Court. (Lodgment No.
20 12.) The state supreme court denied the petition without citation of authority.
21 Accordingly, this Court must “look through” to the state appellate court opinion denying
22 this claim as the basis for its analysis. The state appellate court addressed the claim as
23 follows:

24 Second, Poizner argues the charges underlying two of his lewd or
25 lascivious act convictions, where were based on his touching Brandon’s
26 penis and buttocks when Brandon was 14 years old, must be dismissed
27 because the prosecutor did not prove Poizner was “at least 10 years older
28 than [Brandon].” (Pen. Code, § 288, subd. (c)(1).) . . . [T]he required
statutory age difference appears to have been satisfied. According to the
date of birth listed for Poizner on the accusatory pleading and the abstract

1 of judgment, he was 39 or 40 years old when he committed the charged
2 offenses.

3 (Lodgment No. 11 at 2-3.)

4 In assessing a sufficiency of the evidence claim on federal habeas review, the
5 Supreme Court has stated that “the relevant question is whether, after viewing the
6 evidence in the light most favorable to the prosecution, any rational trier of fact could
7 have found the essential elements of the crime beyond a reasonable doubt.” *Juan H. v.*
8 *Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005) (quoting *Jackson*, 443 U.S. at 319). In
9 determining whether sufficient evidence has been presented, the Court must accept the
10 elements of the crime as defined by state law. *See Jackson*, 443 U.S. at 324, n. 16. Penal
11 Code § 288(c)(1) states:

12 Any person who commits an act described in subdivision (a) with the intent
13 described in that subdivision, and the victim is a child of 14 or 15 years,
14 and that person is at least 10 years older than the child, is guilty of a public
15 offense and shall be punished by imprisonment in the state prison for one,
16 two, or three years, or by imprisonment in a county jail for not more than
17 one year. In determining whether the person is at least 10 years older than
the child, the difference in age shall be measured from the birth date of the
person to the birth date of the child.

18 Cal. Penal Code § 288(c)(1) (West 2010).

19 Under California law, the jury was permitted to find Poizner’s age based on
20 circumstantial evidence. *See People v. Castaneda*, 31 Cal. App. 4th 197, 203-04 (1994)
21 (stating that proof of age need not be in documentary form and that testimony about a
22 defendant’s age, coupled with the jury’s observation of the defendant, is sufficient for the
23 trier of fact to infer age) (citing *People v. Montalvo*, 4 Cal. 3d 328, 335 (1971).) In
24 Poizner’s case, Nanette Konopacky, Poizner’s roommate, testified Poizner was in his late
25 thirties. (Lodgment No. 2, vol. 4 at 510.) Brandon testified Poizner was 39 or 40 years
26 old. (*Id.* at 519, 582.) Under California law, the jury was permitted to use their
27 observation of Poizner and the testimony of Konopacky and Brandon to determine
28 whether Poizner was ten years older than the 12-14 year old children he was accused of

1 molesting. A reasonable trier of fact could have found the ten-year age difference
 2 element of Penal Code § 288(c)(1) beyond a reasonable doubt. *See Juan H.*, 408 F.3d
 3 1262, 1275.

4 The state court's resolution of this claim was neither contrary to, nor an
 5 unreasonable application of, clearly established Supreme Court law, and was not based
 6 on an unreasonable determination of the fact. Thus, the Court **DENIES** relief as to this
 7 claim.

8 E. Exclusion of Character Evidence (Ground Three)

9 In ground three, Poizner contends the trial court violated his right to present a
 10 defense by ruling that, should Poizner present character evidence in the form of testimony
 11 regarding his lack of propensity to commit the offenses, it would open up the door for the
 12 prosecution to present several pieces of evidence the court had excluded, including
 13 evidence the Poizner had snuck into people's homes and molested other children. (Pet. at
 14 51-64; Traverse at 22-25; Lodgment No. 2, vol. 2 at 113-14.) Respondent counters that
 15 the trial court applied California evidentiary law correctly, and, in any event, there is no
 16 Supreme Court precedent directly addressing the question whether a defendant's federal
 17 constitutional due process rights are violated by a trial court's error in applying its own
 18 evidentiary rules. (Mem. of P. & A. Supp. Answer at 32.)

19 Poizner raised this claim in the petition for review from the denial of his state
 20 habeas corpus petition, which he filed in the California Supreme Court. (Lodgment No.
 21 12.) The state supreme court denied the petition without citation of authority.
 22 Accordingly, this Court must "look through" to the state appellate court opinion denying
 23 this claim as the basis for its analysis. The state appellate court denied the claim, as
 24 follows:

25 Third, Poizner complains he was prevented from putting on evidence
 26 of his good character and lack of propensity to molest young boys by the
 27 trial court's erroneous ruling that if he did so, the character witnesses could
 28 be cross-examined about their knowledge of incidents of molestation,
 including those recorded in Poizner's private journal Poizner's

1 complaint has no merit. “It is well established that, ‘[w]hen a defense
 2 witness, other than the defendant himself, has testified to the reputation of
 3 the accused, the prosecution may inquire of the witness whether he has
 4 heard of acts or conduct by the defendant inconsistent with the witness’[s]
 5 testimony.’ [Citation.] So long as the People have a good faith belief that
 6 the acts or conduct about which they wish to inquire actually took place,
 they may so inquire.” (*People v. Siripongs* (1988) 45 Cal.3d 548, 578;
 accord, *People v. Hinton* (2006) 37 Cal.4th 839, 902.)

7 (Lodgment No. 12 at 3.)

8 During trial, counsel explained to the trial court who he proposed to have testify
 9 and what those witnesses would say as follows:

10 MR. CARLOS: Well, your honor, I have a number of [character
 11 witnesses], and I’ve given that discovery to the prosecution. The proposed
 12 testimony would be parents and actual sponsees who have worked with Mr.
 13 Poizner and basically performed very well during their mentoring program.
 14 They could talk about their own contact with Mr. Poizner, which essentially
 – I mean, he does hug them, he does get close to them, and that was just a
 normal part of his routine as a sponsor in that program.

15 The problem here, your honor, is that I think the jury may be led to
 16 believe that –

17 THE COURT: Before you go on to arguing it, I just want to make
 18 sure what they would say. So “he was a nice sponsor. He did hug me and
 19 was close to me, but he didn’t molest me”?

20 MR. CARLOS: Well, obviously I would not go there because if I did
 21 that, then that would be the improper character testimony I think that you
 22 were talking about . . . I wouldn’t go to whether or not “he did didn’t molest
 23 me.” They would say, “This is the contact he had with me. This is the type
 24 of contact. It was normal contact. He helped me through my alcohol or
 substance abuse problems.”

25 Parents will testify that “I met him. I was comfortable with what he
 26 was doing with my son. He wasn’t” – I mean, “He was not inappropriate
 from what I could tell,” not that he didn’t molest them.

27 THE COURT: Go ahead and finish your thoughts then. I don’t quite
 28 understand. If you’re saying, “He wasn’t inappropriate with my son,”

1 aren't you saying "He didn't molest my son"? Isn't that what they're
2 saying?

3 MR. CARLOS: No, I didn't say that. I didn't – they could say, "I
4 didn't see anything inappropriate." I'm not going to ask the children
5 whether they were actually molested. . . .

6
7 I think that I'm in sort of a bind here because I can't present testimony
8 from people from the program saying that, you know, "Yeah, Mr. Poizner,
9 this is what he did. This is how he did it with these people and people went
10 through it with flying colors, at least the people that he worked with." I've
11 got a couple of those ready to go. Obviously, I wouldn't put everybody on
12 but at least a couple to show that he was a capable sponsor.

13
14 THE COURT: Ms. Weismantel, do you want to be heard?

15 MS. WEISMANTEL: Yes, your Honor. I think he's – I mean, he's
16 basically wanting to put on character evidence that this man doesn't have
17 the characteristics of a child molester because he behaved a certain way
18 with these kids and he didn't molest them, so I think it does open the door
19 for me to ask him, "Well, have you heard that he touched, you know,
20 Austin? Have you heard that he admitted doing certain things to Austin,
21 on a pretext phone call? Have you heard that Mr. Poizner wrote about
22 things that he did to somebody that was sleeping" – meaning James – "Have
23 you heard that he touched" –

24
25 THE COURT: Okay, I've – and maybe I've said this before, but I do
26 think that it is appropriate for you, [Mr. Carlos,] if you wish, to put on an
27 expert, somebody, to talk about what the sponsor/sponsee relationship is
28 like in general, what the boundaries of that are and that with young kids it's
common for them to have routine contact, for them to call back and forth.
It may even be common for them to do some physical touching between
them, hugging, et cetera. That's one thing.

I think – I'm not precluding you from putting that on to explain to the
jury that this is a typical sponsor/sponsee relationship or what one is.

1 I think that's different from putting on a specific parent or child that
2 the defendant sponsored to say, "He was my sponsor and nothing
3 inappropriate happened to me." That's different. That is putting on – it's
4 attempting to put on character evidence, trying to use it perhaps by another
5 name but still attempting to put on character evidence in two ways
inappropriately. I think it's specific acts, and that's precluded by evidence
code section 1102, I think.

6 You can put on character evidence. I'm not saying you can't do that.
7 You can put on someone to say – you can put on any of these parents to
8 say, "I knew him. He had a relationship with my child. They were together
9 for" – however many times – "and in my opinion, based on what I know of
him, he is not the type of person to molest a child." You can do that.

10 I'm not precluding you from putting on character evidence, but it has
11 to be the right type of character evidence. Under 1102 it's opinion evidence
12 or reputation evidence, not specific acts, so that's your choice.

13 MR. CARLOS: Right. And just so we're clear on the court's ruling,
14 should I do the opinion evidence, then everything that was excluded from
the journal is admissible?

15 THE COURT: That's the next step that I wanted to go to. If you put
16 on that opinion evidence, what can be used in the have-you-heard type
17 questions by Ms. Weismantel, and I don't think I ruled on that yet. I said
18 certainly it opens the door.

19 I think I'm still required to do a 352 analysis on that, and so that's
20 what I wanted to make clear on the record, that I have done that; I've given
some thought to that.

21 It certainly allows Ms. Weismantel to ask these witnesses if they've
22 heard or are aware of any of the allegations that the kids have testified to
23 here. That's evidence before the jury, so that includes the "Dear James"
24 letter, it includes the "Homeboy" letter, and it includes all of the evidence
that the kids have testified to. That is fair game.

25

26 There are other things in his journals that I do think I have previously
27 kept out in his case in chief but would be fair questions to ask a character
28

1 witness. . . . [¶] . . . If a character witness is going to say he is not of a
 2 character to molest a child, his specific statements in that regard would be
 3 relevant to ask about.

4 The “boundaries” entry which I kept out in the People’s case in chief
 5 where he talks about not being able to hang out with underage newcomers,
 6 not being to talk about masturbation and sex, that is fair game for a
 7 character witness. It goes specifically to whether or not he has a character
 8 trait of molesting children [¶] . . . Mr. Carlos, from a logical standpoint,
 9 you can’t put a witness on to say, “I think he does not have the character
 10 for molesting children” when he has specifically written about molesting
 11 children and not be able to ask about that.

12 (Lodgment No. 2, vol. 5 at 833-41.)

13 To the extent Poizner is attacking the state court’s interpretation and application of
 14 its own rules of evidence, he is not entitled to relief. *Estelle*, 502 U.S. at 67-68; *see also*
 15 28 U.S.C. § 2254(a). Simply claiming that a state court’s improper application of state
 16 law violated a petitioner’s due process rights does not transform the claim into a federal
 17 one. *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996). Moreover, the state trial
 18 judge’s ruling was correct under state law. *See People v. Hinton*, 37 Cal. 4th 839, 902
 19 (2006) (stating that “[w]hen a defense witness gives character testimony, the prosecutor
 20 may inquire of the witness whether he or she has heard of acts or conduct by the
 21 defendant inconsistent with that testimony, so long as the prosecutor has a good faith
 22 belief that such acts or conduct actually took place”) citing *People v. Barnett*, 17 Cal. 4th
 23 1044, 1170 (1998).

24 Contrary to Poizner’s claim, no evidence was actually excluded by the trial judge
 25 and he was not prevented from presenting any evidence in his defense. Clearly
 26 established federal law holds that the right to present evidence and witnesses is essential
 27 to due process and is guaranteed by the compulsory process clause of the Sixth
 28 Amendment. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *Chambers v. Mississippi*, 410
 U.S. 294 (1973); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Dunham v. Deeds*, 954
 F.2d 1501, 1503 (9th Cir. 1992). But “[t]he defendant’s right to present evidence . . . is

1 not absolute.” *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983). A defendant “must
 2 comply with established rules of procedure and evidence designed to assure both fairness
 3 and reliability in the ascertainment of guilt and innocence.” *Chambers*, 410 U.S. at 302.
 4 The exclusion of defense evidence is error only if it renders the state proceeding so
 5 fundamentally unfair as to violate due process. *Estelle*, 502 U.S. at 67; *Bueno v.*
 6 *Hallahan*, 988 F.2d 86, 87 (9th Cir. 1993). Here, no such fundamentally unfair
 7 proceeding occurred. Rather, counsel made a strategic decision not to present character
 8 witnesses because, had he done so, the prosecutor would have been able to ask those
 9 witnesses about the accusations leveled against him by the victims as well as evidence
 10 from Poizner’s journals, which the judge had previously excluded, establishing he had
 11 broken into houses and touched or looked at young boys. (Lodgment No. 2, vol. 5 at
 12 839.) The trial judge simply properly applied a standard rule of the California Evidence
 13 Code in Poizner’s case.

14 Poizner claims the trial judge’s ruling was improper because had defense counsel
 15 presented character witnesses on behalf of Poizner, the trial judge would have permitted
 16 the prosecutor to cross examine them with “guilt assuming hypotheticals,” which Poizner
 17 contends violates due process. (Pet. at 34-36.) The case law Poizner cites as support for
 18 this claim are circuit court cases. Poizner had not cited any clearly established Supreme
 19 Court law holding that “guilt assuming hypotheticals” violate due process, nor has this
 20 Court located any. Without such authority, this Court cannot conclude the state court’s
 21 denial of the claim was contrary to, or an unreasonable application of, clearly established
 22 Supreme Court law. *See Musladin*, 549 U.S. at 77.

23 Moreover, the cases Poizner cites are distinguishable. In *United States v.*
 24 *Shwyader*, 169 F.3d 1109, 1114-15 (9th Cir. 2002), the prosecutor improperly asked the
 25 defendant’s character witnesses whether their opinion would change if the defendant had
 26 committed the acts alleged in the indictment. In *United States v. Candelaria-Gonzalez*,
 27 547 F.2d 291, 294 (5th Cir. 1977), the prosecutor improperly asked character witnesses
 28 whether their opinion of the defendant would change if he were convicted of the crimes

1 for which he was being prosecuted. In *United States v. Barta*, 888 F.2d 1220, 1224-25
 2 (8th Cir. 1989), the court condemned the prosecutor when he asked whether the
 3 defendant's character witness's opinion would change if he knew the defendant "had lied
 4 on his income tax return," the charge for which he was on trial. In *United States v.*
 5 *Polsinelli*, 649 F.2d 793, 795 (10th Cir. 1981), the prosecutor asked a character witness if
 6 her opinion would change if "she 'knew that on at least two occasions during April of
 7 1979 [Polsinelli] distributed one ounce quantities of cocaine," again, the charge for which
 8 he was being prosecuted. *See also United States v. Oshatz*, 912 F.2d 534 539 (2nd Cir.
 9 1990) (prosecutor asked whether character witness's opinion would change if he knew
 10 defendant had committed the acts alleged in the indictment).⁶ In contrast, the trial judge
 11 in Poizner's case indicated that the prosecutor would be permitted to ask Poizner's
 12 character witnesses "if they've heard or are aware of the allegations that these kids have
 13 testified to here." (Lodgment No. 2, vol. 5 at 838.) The judge also indicated the
 14 prosecutor could ask character witnesses about the previously excluded journal entries in
 15 which Poizner admitted to breaking into homes to observe children sleeping or observe
 16 their bodies. (*Id.* at 839.) None of the permitted questions included the kind of guilt
 17 assuming hypotheticals considered in the circuit court cases cited by Poizner.

18 For all the foregoing reason, the Court concludes the state court's rejection of this
 19 claim was neither contrary to, nor an unreasonable application of, clearly established
 20 Supreme Court law. *Williams*, 529 U.S. 412-13. Nor was it based on an unreasonable
 21 determination of the facts. The claim is **DENIED**.

22 F. Jury Instructions and the Burden of Proof (Ground Four)

23 In ground four, Poizner contends the trial court's modification of the jury
 24 instructions for the charged allegations reduced the prosecution's burden of proof,
 25 thereby violating Poizner's due process and fair trial rights. (Pet. at 65-72; Traverse at
 26 _____)

27 ⁶ Poizner also cites *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005) as support for his argument.
 28 The court in that case, however, did not conclude that the prosecutor's questions were improper. *See id.*
 at 554.

26-28.) Respondent counters that the instructions adequately informed the jury of its obligation to find that the allegations were true beyond a reasonable doubt, and that the state appellate court's decision denying this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. (Mem of P. & A. Supp. Answer at 35-36.)

Poizner raised this claim in the petition for review, filed in the California Supreme Court, from the denial of habeas corpus petition he filed in state court. (Lodgment No. 12.) The California Supreme Court denied the petition without citation of authority (Lodgment No. 13.) Accordingly, this Court must "look through" to the California Appellate Court's denial of this claim as the basis for its analysis. That court wrote:

Fourth, Poizner contends the trial court deprived him of his due process right to a fair trial by lowering the People's burden of proof with respect to allegations that Poizner used obscene matter during the commission of certain offenses. (Penal Code, §1203.066, subd. (a)(9)), committed an offense against more than one victim (*id.*, § 667.61, subd. (e)(4)), committed a felony while released on bail (*id.*, § 12022.1, subd. (b)), and had substantial sexual conduct with a victim under the age of 14 years (*id.*, § 1203.066, subd. (a)(8)). Specifically, Poizner contends "the trial court instructed the jury on [each] allegation but omitted the reasonable doubt portion of the instruction. Then, after reading several allegations, the trial court read to the jury a modified reasonable doubt instruction." This contention, like the preceding two, could have been asserted on appeal but was not, and is therefore procedurally barred. (*In re Reno*, *supra*, 55 Cal. 4th at p. 490; *In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Also like the prior contentions, this one lacks merit. Immediately after the trial court read the instructions on the various allegations, the court told the jury: "As with the crime, the People have the burden of proving beyond a reasonable doubt the truth of each allegation. If you have a reasonable doubt that an allegation is true, you must find it to be not true." The jury was also given written copies of these instructions. Jurors are presumed to be able to correlate instructions; and instructions are adequate where, as here, read as a whole they correctly advise the jury of the applicable law. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1089.) The trial court therefore was not required to tell the jury four separate times (once for each allegation) that the People had to prove the allegation beyond a reasonable doubt, and appellate counsel did not provide

1 ineffective assistance by not arguing otherwise on appeal. (*Constancio*,
2 *supra*, 42 Cal.App.3d at p. 546 [counsel not required to make meritless
3 argument].)

4 (Lodgment No. 11 at 4.)

5 The Supreme Court addressed the necessity of instructing a jury on the
6 prosecution's burden of proof in *Carella v. California*, 491 U.S. 263 (1989):

7 The Due Process Clause of the Fourteenth Amendment denies States
8 the power to deprive the accused of liberty unless the prosecution proves
9 beyond a reasonable doubt every element of the charged offense. *In re*
10 *Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).
11 Jury instructions relieving States of this burden violate a defendant's due
12 process rights. *See Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85
13 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450,
61 L.Ed.2d 39 (1979). Such directions subvert the presumption of
innocence accorded to accused persons and also invade the truth-finding
task assigned solely to juries in criminal cases.

14 *Id.* at 266.

15 An instructional error can form the basis for federal habeas corpus relief only if it
16 is shown that “the ailing instruction by itself so infected the entire trial that the resulting
17 conviction violates due process.” [citation omitted].” *Murtishaw v. Woodford*, 255 F.3d
18 926, 971 (9th Cir. 2001) (citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973));
19 *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The allegedly erroneous jury instruction
20 cannot be judged in isolation, however. *Estelle*, 502 U.S. at 72. Rather, it must be
21 considered in the context of the entire trial record and the instructions as a whole. *Id.*

22 The trial judge in Poizner's case decided to simplify the instructions by placing the
23 “beyond a reasonable doubt” instruction at the end of the instructions for all the
24 allegations instead of repeating the instruction for each allegation. Poizner contends the
25 trial judge reduced the burden of proof on the prosecution by altering the language of the
26 reasonable doubt instruction for the allegations from “[t]he People have the burden of
27 proving this allegation beyond a reasonable doubt. *If you find the People have not met*
28 *this burden*, you must find that this allegation has not been proved” to “[t]he People have

1 the burden of proving this allegation beyond a reasonable doubt. *If you have a*
 2 *reasonable doubt the allegation is true*, you must find it not to be true.” (Pet. at 68-69)
 3 (italics added).

4 Poizner’s claim is meritless. The jury was clearly told the prosecution had the
 5 burden of proving the allegations beyond a reasonable doubt. (Lodgment No. 1, vol. 1 at
 6 0198.) In addition, they were told that “[w]henver I tell you the People must prove
 7 something, I mean they must prove it beyond a reasonable doubt.” (*Id.* at 0157.) Poizner
 8 does not explain how the two phrases “the People have the burden of proving [the
 9 allegations] beyond a reasonable doubt[, and] if the People have not met this burden, you
 10 must find the allegation has not been proved” and “The People have the burden of
 11 proving beyond a reasonable doubt the truth of each allegation[, and] if you have a
 12 reasonable doubt that an allegation is true, you must find it not to be true,” differ in any
 13 substantial way. “The Constitution neither prohibits trial courts from defining reasonable
 14 doubt nor requires them to do so as a matter of course.” *Victor v. Nebraska*, 511 U.S. 1,
 15 5 (1994). “[T]he proper inquiry is not whether the instruction ‘could have’ been applied
 16 in an unconstitutional manner, but whether there is a reasonable likelihood that the jury
 17 did so apply it.” *Id.* at 6, citing *Estelle*, 502 U.S. at 72. Here, there is no reasonable
 18 likelihood the jury found the allegations to be true based on a standard lower than beyond
 19 a reasonable doubt. They were repeatedly instructed that in order to find Poizner guilty
 20 of the crimes and to find the allegations to be true, they must do so beyond a reasonable
 21 doubt. Accordingly, the Court concludes the state courts’ resolution of this claim was
 22 neither contrary to, nor an unreasonable application of, clearly established Supreme Court
 23 law. It was also not based on an unreasonable determination of the facts. The claim is
 24 **DENIED.**

25 G. Cruel and Unusual Punishment (Ground Five)

26 Next, Poizner argues his sentence of 75 years-to-life plus seven years violates the
 27 Eighth Amendment. (Pet. at 73-78; Traverse at 29.) Respondent counters the state
 28 ///

1 court's denial of this claim was neither contrary to, nor an unreasonable application of,
2 clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 36-39.)

3 Poizner raised this claim in the petition for review he filed in the California
4 Supreme Court challenging the appellate court's denial of his habeas corpus petition.
5 (Lodgment No. 12.) That court denied the petition without citation of authority.
6 (Lodgment No. 13.) Accordingly, this Court must "look through" to the state appellate
7 court's opinion addressing this claim as the basis for its analysis. *Ylst*, 501 U.S. at 805-
8 06. That court wrote:

9 Fifth and finally, Poizner claims imposition of five consecutive prison
10 terms of 15 years to life each, pursuant to Penal Code section 667.61, is so
11 grossly disproportionate to his culpability that it violates constitutional bans
12 on cruel and/or unusual punishment. (U.S. Const., 8th Amend.; *Robinson*
13 *v. California* (1962) 370 U.S. 660, 666-667 [applying 8th Amend. Ban to
14 states through 14th Amend.]; Cal. Const., art. I, § 17.) Once again, the
15 claim is procedurally barred because Poizner could have raised it on appeal
16 but did not. (*In re Reno*, *supra*, 55 Cal.4th at p. 490; *In re Dixon*, *supra*, 41
17 Cal.2d at p. 759.) The claim also fails on the merits. "Successful grossly
18 disproportionate challenges are 'exceedingly rare' and appear only in
19 an 'extreme case.'" (*People v. Em* (2009) 171 Cal.App.4th 964, 977.) This
20 is not such a rare or extreme case. Poizner was convicted of 10 counts of
21 committing lewd or lascivious acts on three boys who were 14 years old or
22 younger, despicable crimes the Legislature has determined deserve severe
23 punishment. Poizner's prison sentence, though long, is not "so
24 disproportionate to the crime[s] for which it [was] inflicted that is shocks
25 the conscience and offense fundamental notions of human dignity." (*In re*
26 *Lynch* (1972) 8 Cal.3d 410, 424.) Indeed, California appellate courts
27 repeatedly have rejected cruel and/or unusual punishment challenges to
28 lengthy prison sentence imposed pursuant to Penal Code section 667.61.
(*People v. Perez* (2013) 214 Cal.App.4th 49, 60; *People v. Meneses* (2011)
193 Cal.App.4th 1087, 1092-1094; *People v. Alvarado* (2001) 87
Cal.App.4th 178, 199-201; *People v. Estrada* (1997) 57 Cal.App.4th 1270,
1277-1282; *People v. Crooks* (1997) 55 Cal.App.4th 797, 804-809.)

(Lodgment No. 11 at 4.)

In *Andrade*, the Supreme Court concluded that the only clearly established legal
principle that could be discerned from the Court's Eighth Amendment jurisprudence was

1 that “[a] gross disproportionality principle is applicable to sentences for a term of
 2 years . . . [T]he precise contours of [the principle] are unclear, [and it is] applicable only
 3 in the ‘exceedingly rare’ and ‘extreme’ case.” *Andrade*, 538 U.S. at 72-73 (citing
 4 *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)). The Supreme Court also explained
 5 that “the governing legal principle gives legislatures broad discretion to fashion a
 6 sentence that fits within the scope of the proportionality principle” *Id.* at 76
 7 (quoting *Harmelin*, 501 U.S. at 998). Because of this, “[t]he gross disproportionality
 8 principle reserves a constitutional violation for only the extraordinary case.” *Id.* at 77.

9 The Ninth Circuit has applied these principles and has given this Court some
 10 guidance as to the kind of “exceedingly rare” Eighth Amendment claim that warrants
 11 federal habeas relief. *See Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)
 12 (“[Ninth Circuit] cases may be persuasive authority for purposes of determining whether
 13 a particular state court decision is an ‘unreasonable application’ of Supreme Court law,
 14 and also may help us determine what law is ‘clearly established.’”). In *Ramirez v.*
 15 *Castro*, 365 F.3d 755, 775 (9th Cir. 2004), the court concluded that a sentence of twenty-
 16 five years to life for a nonviolent shoplifting of a \$199.00 VCR where the defendant’s
 17 prior convictions were two nonviolent second degree robberies, violated the Eighth
 18 Amendment. The Ninth Circuit struck down a sentence of twenty-eight years to life
 19 imposed on a defendant who had failed to update his sex offender registration within five
 20 days of his birthday. *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008). The Court
 21 found that there was no “rational relationship between Gonzalez’s failure to update his
 22 sex offender registration annually and the probability that he will recidivate as a violent
 23 criminal or sex offender.” *Id.* at 887. Without a rational connection between Gonzalez’s
 24 past behavior and his current conviction, there was no justification for an increased
 25 sentence for the “passive, harmless and technical violation of the registration law.” *Id.* at
 26 885.

27 The Ninth Circuit has upheld sentences, however, in cases where either the
 28 triggering offense or the defendant’s prior record involve violence or the threat of

1 violence. Thus, in *Rios v. Garcia*, 390 F.3d 1082 (9th Cir. 2004), the court concluded
 2 that a sentence of twenty-five years to life for a conviction for a felony petty theft did not
 3 violate the Eighth Amendment because Rios “struggled with the loss prevention officer
 4 and tried to avoid apprehension [H]is prior robbery ‘strikes’ involved the threat of
 5 violence because his cohort used a knife Rios [had] a lengthy criminal history,
 6 beginning in 1982, and he ha[d] been incarcerated several times.” *Id.* at 1086. In *Taylor*
 7 *v. Lewis*, 460 F.3d 1093 (9th Cir. 2006), the court upheld a sentence of twenty-five years
 8 to life for felony possession of cocaine and misdemeanor possession of drug
 9 paraphernalia. Although the triggering offense was nonviolent, Taylor’s prior
 10 convictions included second-degree burglary, robbery with a firearm, and voluntary
 11 manslaughter with the use of a weapon. *Id.* at 1100.

12 Finally, the Ninth Circuit upheld a life sentence without parole in *Norris v.*
 13 *Morgan*, 622 F.3d 1276 (9th Cir. 2010) for child molestation conviction under
 14 Washington’s “two strikes” law. In conducting de novo review of Norris’ Eighth
 15 Amendment challenge on habeas review, the Court began by analyzing whether “‘the
 16 crime committed and the sentence imposed leads to an inference of gross
 17 disproportionality.’” *Norris*, 622 F.3d at 1290 (quoting *Harmelin*, 501 U.S. at 1005).
 18 The “harshness of the penalty imposed upon the defendant” is to be compared to “the
 19 gravity of the triggering offense,” and a court can consider the state’s justification for the
 20 sentencing scheme and “the actual harm caused to his victim or to society.” *Id.* (citations
 21 omitted). The Ninth Circuit noted that in determining the gravity of the offense, courts
 22 are to “look beyond the label of the crime” and examine the “factual specifics” of it. *Id.*
 23 (citing *Reyes v. Warden*, 399 F.3d 964, 969 (9th Cir. 2005) and *Ramirez*, 365 F.3d at 768).
 24 Norris’ crime involved touching a five-year-old girl on her genitalia over her clothes for a
 25 few seconds. Nevertheless, the Court found the fact that the crime was committed
 26 against a person pivotal:

27 Norris’ offense is undisputably not “one of the most passive crimes a person
 28 can commit,” like the utterance of a \$100 “no account” check in *Solem*, 436

U.S. at 296 [citation omitted], or the nonviolent petty theft of a \$199 VCR in *Ramirez*, 365 F.3d at 768. Nor does Norris' offense conduct amount to an "entirely passive, harmless, and technical violation" of a regulatory offense like the offender's failure to timely update his sex offender registration in *Gonzalez*, 551 F.3d at 886. Norris committed an offense against a person rather than property, *see Solem*, 463 U.S. at 293 [citation omitted] (noting that criminal law is more protective of people than property), and against a five-year-old child rather than an adult. . . . [W]e are aware of no case in which a court has found a defendant's term-of-years sentence for a non-homicide crime *against a person* to be grossly disproportionate to his or her crime.

. . . .

Furthermore, "[t]he impact of [child molestation] on the lives of [its] victims is extraordinarily severe "[W]e and our sister circuits have [therefore] consistently held that sexual offenses [by older adults] against younger children constitute 'crimes of violence.'" *United States v. Medina-Villa*, 567 F.3d 507, 515 (9th Cir. 2009).

Norris, 622 F.3d at 1293-94.

The Ninth Circuit has also upheld harsh and lengthy sentences in several unpublished cases similar to Poizner's.⁷ In *Poslof v. Yates*, 462 Fed. Appx. 710 (9th Cir. 2010), the Court upheld a sentence of 27 years-to-life for failing to register a new residence as a sex offender in the face of an Eighth Amendment challenge. In *Blakaj v. McEwan*, 2013 WL 3811813 (9th Cir. 2013), the Court upheld a sentence of 30 years-to-life for various sexual offenses against several victims under California's "one strike" law, the same sentencing scheme under which Poizner was sentenced. The *Blakaj* court noted:

Petitioner's current convictions are for [sexual crimes] – involving multiple victims. These current offenses, involving crimes against multiple victims occurring in a single evening, are more serious than the petty theft convictions in *Andrade*, the shoplifting conviction in *Ewing*, the uttering

⁷ Pursuant to Ninth Circuit Rule 36-3(c), "Unpublished decisions and orders of [the Ninth Circuit] issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1."

1 false check conviction in *Solem*, and the obtaining money under false
 2 pretenses conviction in *Rummel*, none of which were even crimes against
 3 persons Further, they were not victimless crimes or of a minor nature.

4 *Id.* at *19.

5 Poizner's crimes, like the defendants in *Norris* and *Blakaj*, are serious, sexual
 6 crimes against multiple juvenile victims. They are not "passive," "harmless," or
 7 "technical violations" of a regulatory offense. Rather, they are intentional harms
 8 committed upon young boys who were vulnerable due to their substance abuse issues and
 9 who looked to Poizner as a trusted adult in their lives. Poizner abused his victims and
 10 violated the trust they placed in him for his own pleasure, and thus his case is not the
 11 "exceedingly rare" instance where the sentence is disproportionate to the crime. Thus,
 12 the state court's denial of this claim was neither contrary to, nor an unreasonable
 13 application of, clearly established Supreme Court law. Nor was it based on a
 14 unreasonable determination of the facts. For the foregoing reasons, the claim is
 15 **DENIED.**

16 H. Erroneous Admission of Uncharged Acts (Ground Six)

17 In ground six, Poizner argues the state trial judge improperly admitted evidence
 18 from his journals in which he described sexual conduct with individuals other than the
 19 victims. (Pet. at 79-95; Traverse at 30-31.) The evidence was admitted under California
 20 Evidence Code § 1108 as propensity evidence and under Evidence Code § 1101 as
 21 evidence of intent.⁸ Poizner contends the evidence should not have been admitted
 22

23 ⁸ Evidence Code § 1101(b) provides:

24 Nothing in this section prohibits the admission of evidence that a person committed a
 25 crime, civil wrong, or other act when relevant to prove some fact (such as motive,
 26 opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or
 27 accident, or whether a defendant in a prosecution for an unlawful sexual act or
 28 attempted unlawful sexual act did not reasonably and in good faith believe that the
 victim consented) other than his or her disposition to commit such an act.
 Cal. Evid. Code § 1101 (West 2003).

Evidence Code § 1108(a) provides:

1 because it violated California’s “corpus delicti” rule. (Pet. at 87-95; Traverse at 30-31.)
 2 Respondent argues first the claims are based only on state law, for which federal habeas
 3 corpus relief is not available, and that, in any event there is no clearly established
 4 Supreme Court law which states the admission of propensity evidence violates due
 5 process. (Mem. of P. & A. Supp. Answer at 39-42.)

6 Poizner raised this claim in the petition for review he filed in the California
 7 Supreme Court on direct review. (Lodgment No. 7.) That court denied the petition
 8 without citation of authority. (Lodgment No. 8.) Accordingly, this Court must “look
 9 through” to the state appellate court’s opinion denying the claim as the basis for its
 10 analysis. *Ylst*, 501 U.S. at 805-06. That court wrote:

11 *A. Legal Principles*

12 “The purpose of the corpus delicti rule is to satisfy the policy of the
 13 law that ‘one will not be falsely convicted, by his or her untested words
 14 alone, of a crime that never happened.’ ” (*People v. Miranda* (2008) 161
 15 Cal.App.4th 98, 107; see also *People v. Alvarez*, *supra*, 27 Cal.4th at p.
 16 1169.) The rule requires the prosecution to “prove the corpus delicti, or the
 17 body of the crime itself — i.e., the fact of injury, loss, or harm, and the
 18 existence of a criminal agency as its cause. In California, it has traditionally
 19 been held, the prosecution cannot satisfy this burden by relying exclusively
 20 upon the extrajudicial statements, confessions, or admissions of the
 21 defendant.” (*Alvarez*, at pp. 1168–1169.) However, “ ‘[t]he amount of
 22 independent proof of a crime required for this purpose is quite small [and
 23 has been] described . . . as “slight” [citation] or “minimal.” ’ ” (*People v.*
 24 *Herrera* (2006) 136 Cal.App.4th 1191, 1200, quoting *People v. Jones*
 25 (1998) 17 Cal.4th 279, 301.) Such proof may be circumstantial and need
 26 not be beyond a reasonable doubt; it is sufficient if it permits an inference
 27 of criminal conduct, even if a noncriminal explanation is also plausible.
 28 (*Alvarez*, 27 Cal.4th at p. 1171.) “[O]nce the necessarily quantum of
 independent evidence is present, the defendant’s extrajudicial statements
 may then be considered for their full value to strengthen the case on all
 issues.” (*Ibid.*)

“In a criminal action in which the defendant is accused of a sexual offense, evidence of the
 defendant’s commission of another sexual offense or offenses is not made inadmissible by
 Section 1101, if the evidence is not inadmissible pursuant to Section 352. Cal. Evid. Code
 § 1108 (West 2003).

1 B. *Analysis*

2 As Poizner acknowledges, the California Supreme Court has not
 3 squarely decided whether the corpus delicti rule applies to evidence
 4 admissible under sections 1101, subdivision (b) or 1108. (See *People v.*
 5 *Clark* (1992) 3 Cal.4th 41, 124 [addressing evidence admitted under section
 6 1101, subdivision (b): “It is not clear that the corpus delicti rule applies to
 7 other crimes evidence offered solely to prove facts such as motive,
 8 opportunity, intent, or identity, or for impeachment”]; declining to decide
 9 the issue because the corpus was independently established]; see also
 10 *People v. Horning, supra*, 34 Cal.4th at p. 899 [noting *Clark*’s statement of
 11 uncertainty].) In *People v. Martinez* (1996) 51 Cal.App.4th 537, this court
 12 acknowledged the high court had left the question unresolved, and
 13 considered whether the corpus delicti rule applied to uncharged bad acts
 14 introduced for impeachment purposes in the guilt phase of trial. Agreeing
 15 with the observations and analysis of the appellate court in *People v. Denis*
 16 (1990) 224 Cal.App.3d 563, we observed in *Martinez* that the defendant
 17 had relied only on dicta as the corpus delicti rule had never been applied to
 18 evidence of other prior crimes. (*Martinez*, 51 Cal.App.4th at pp. 544–545.)
 19 Further, we concluded it was reasonable that the corpus delicti rule did not
 20 apply when a prior uncharged offense was introduced only for
 21 impeachment: “There is no requirement that the proponent of a prior
 22 inconsistent statement prove the truth of the prior statement since it is
 23 inconsistency itself which makes the prior statement relevant and
 24 admissible evidence.” (*Id.* at p. 546.)

25 Poizner maintains that regardless of whether the corpus delicti rule
 26 applies to evidence offered for impeachment or under section 1101, it
 27 should apply to propensity evidence admitted under section 1108, because
 28 such evidence has historically been excluded as inherently prejudicial and
 provides a stronger basis for applying the rule than other evidence for
 impeachment or intent and motive. He asks us to find these circumstances
 akin to the introduction of unadjudicated crimes admitted in aggravation at
 the penalty phase of a capital trial, where the corpus delicti rule applies.
 (See *People v. Valencia* (2008) 43 Cal.4th 268, 296.)

We conclude the trial court did not err with respect to its admission of
 the James and Homeboy writings. Following *Clark*, the high court decided
People v. Alvarez, where it addressed whether the corpus delicti rule was
 abrogated by the “Right to Truth-in-Evidence” amendment to the
 California Constitution providing that “relevant evidence shall not be

1 excluded in any criminal proceeding.” (Cal. Const., art. I, § 28, subd. (d).)
 2 (*Alvarez, supra*, 27 Cal.4th at p. 1165.) The Court concluded the
 3 constitutional provision changed the aspect of the corpus delicti rule
 4 regarding the admission of extrajudicial statements: “[I]nsofar as the
 5 corpus delicti rule restricts the admissibility of incriminatory extrajudicial
 6 statements by the accused, [article I,] section 28 [, subdivision] (d)
 7 abrogates it.” (*Alvarez*, at p. 1174; see *People v. Valencia, supra*, 43
 8 Cal.4th at p. 297.) The rule’s independent proof requirement to support a
 9 conviction, however, remained undisturbed: section 28, subdivision (d)
 “did not abrogate the corpus delicti rule insofar as it provides that every
 conviction must be supported by some proof of the corpus delicti aside from
 or in addition to such statements, and that the jury must be so instructed.”
 (*Alvarez*, 27 Cal.4th at p. 1165.)

10 Thus, “[a]s a result of the first determination in *Alvarez*, ‘there no
 11 longer exists a trial objection to the admission in evidence of the defendant’s
 12 out-of-court statements on grounds that independent proof of the corpus
 13 delicti is lacking. If otherwise admissible, the defendant’s extrajudicial
 14 utterances may be introduced in his or her trial without regard to whether
 15 the prosecution has already provided, or promises to provide, independent
 16 prima facie proof that a criminal act was committed.’ [Citation.] However,
 17 as a result of the second determination, the jury must be instructed ‘that no
 18 person may be convicted absent evidence of the crime independent of his
 or her out-of-court statements’; also, the defendant may, on appeal, ‘attack
 the sufficiency of the prosecution’s independent showing.’ ” (*People v.*
Powers–Monachello (2010) 189 Cal.App.4th 400, 407–408.)

19 Here, Poizner’s writings, which reflected either nonconsensual sexual
 20 touching of James A. or sexual activity with a 17-year-old, were otherwise
 21 admissible under section 1108 as circumstantially relevant to the issue of
 22 his disposition or propensity to commit sex offenses. (*People v. Reliford*
 23 (2003) 29 Cal.4th 1007, 1012.) Accordingly, the corpus delicti rule no
 24 longer prevented admission of the writings into evidence. (See *People v.*
Valencia, supra, 43 Cal.4th at p. 297.) Under *People v. Alvarez, supra*, 27
 25 Cal.4th 1161, notwithstanding Proposition 8, the court must “instruct the
 26 jury that [the defendant’s extrajudicial] statements cannot be the sole proof
 27 the crime occurred.” (*Id.* at p. 1181.) The trial court so instructed the jury
 28 in this case. Not only was the jury correctly instructed with a proper corpus
 delicti instruction, but the court also appropriately instructed the jury that
 the uncharged offenses were not sufficient by themselves to prove beyond

1 a reasonable doubt that Poizner committed the charged offenses. (*Reliford*,
2 29 Cal.4th at p. 1013.)

3 We otherwise decline to apply the corpus delicti rule in the context of
4 prior uncharged offenses offered under section 1108 for purposes of
5 inferring propensity. A trial court must instruct, sua sponte, on corpus
6 delicti where a defendant's extrajudicial admission of guilt would
7 otherwise qualify as substantial evidence to support a conviction. (See
8 *People v. Najera* (2008) 43 Cal.4th 1132, 1137.) The circumstances
9 presented here do not implicate the purpose of the rule, which is to require
10 sufficient independent corroboration of the defendant's confessions to
11 crimes for which he is on trial. "As one court explained, 'Today's judicial
12 retention of the [corpus delicti] rule reflects the continued fear that
13 confessions may be the result of either improper police activity or the
14 mental instability of the accused, and the recognition that juries are likely
15 to accept confessions uncritically.' [Citation.] [¶] Viewed with this in
16 mind, the low threshold that must be met before a defendant's own
17 statements can be admitted against him makes sense; so long as there is
18 some indication that the charged crime actually happened, we are satisfied
19 that the accused is not admitting to a crime that never occurred." (*People*
20 *v. Jennings* (1991) 53 Cal.3d 334, 368.) Poizner was not charged with
21 crimes against James A. and Homeboy, there was no danger he would be
22 convicted of such crimes, and those uncharged offenses could not serve as
23 substantial evidence to support Poizner's convictions. We hold the trial
24 court was not required to instruct the jury that the prosecution was required
25 to present independent proof of the acts described in Poizner's writings,
26 which were admitted for the limited purpose of permitting the jury to infer
27 Poizner's propensity to commit sex offenses.
28

21 Finally, even if error occurred, it would not warrant reversal of the
22 judgment. We assess prejudice relating to the corpus delicti rule under the
23 state law standard of *People v. Watson* (1956) 46 Cal.2d 818. (See *People*
24 *v. Fuiava* (2012) 53 Cal.4th 622, 719, fn. 36 [assessing claim of corpus
25 delicti error in penalty phase under state law standard].) "Error in omitting
26 a corpus delicti instruction is considered harmless, and thus no basis for
27 reversal, if there appears no reasonable probability the jury would have
28 reached a result more favorable to the defendant had the instruction been
given." (*People v. Alvarez, supra*, 27 Cal.4th at p. 1181.) Here, each victim
testified in detail about the acts committed against him by Poizner, and the
prosecution bolstered Austin's testimony with the pretext call with
Poizner's incriminating statements. Further, despite hearing the evidence

1 of Poizner's writings, the jury convicted him of lesser included offenses on
 2 two of the section 288 charges as to Brandon P. Thus, the verdicts
 3 themselves reveal that the evidence did not have an overly prejudicial
 4 impact. In sum, Poizner cannot show prejudice, even assuming error in the
 jury instructions.

5 (Lodgment No. 6 at 14-19.)

6 Poizner's claim regarding the corpus delicti error rests solely on state law.⁹ He
 7 contends "the trial court erred by admitting Poizner's handwritten notes because the
 8 prosecution failed to prove requisite corpus delicti of the uncharged sexual offenses,"
 9 citing only California law, then states this error deprived Poizner of his federal due
 10 process rights. (Pet. at 79-80.) But, as previously noted, simply claiming that a state
 11 court's improper application of state law violated a petitioner's due process rights does
 12 not transform the claim into a federal one. *Langford*, 110 F.3d at 1389. Moreover, the
 13 state trial judge's ruling was correct under state law. As the appellate court noted, "the
 14 California Supreme Court has not squarely decided whether the corpus delicti rule applies
 15 to evidence admissible under sections 1101, subdivision (b) or 1108," and that with
 16 respect specifically 1108 evidence, the California Supreme Court in *People v. Alvarez*, 27
 17 Cal. 4th 1161 (2002) concluded that extrajudicial statements are admissible even if there
 18 is no independent proof of the corpus delicti so long as the jury is instructed, as they were
 19 in Poizner's case, that a conviction cannot be based on extrajudicial statements alone. *Id.*
 20 at 1180-81.

21 In any event, as Respondent notes, there is no clearly established Supreme Court
 22 law which holds that character or "propensity" evidence is inadmissible or violates due
 23 process. Indeed, the Supreme Court expressly reserved deciding that issue in *Estelle*, 502

24 ///

25
 26 ⁹ Poizner cites *Opper v. United States*, 348 U.S. 84, 93-94 (1954) and *United States v. Hilger*, 728 F.3d
 27 947, 949 (9th Cir. 2013) as support for his claim. (Traverse at 32-22.) But *Opper* addressed the corpus
 28 delicti requirement in the context of federal criminal prosecutions, not federal habeas corpus
 proceedings, and for charged offenses, not uncharged ones. *Hilger* simply finds *Opper* is not applicable
 to supervised release proceedings. Thus, they are inapposite.

U.S. at 75 n.5. *See Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008); *Alberni*, 458 F.3d at 864. As the Ninth Circuit has noted:

The Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process. Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, [citation omitted], it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ. Absent such “clearly established Federal law,” we cannot conclude that the state court’s ruling was an “unreasonable application.”

Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citing *Williams* 529 U.S. at 375 and *Musladin*, 549 U.S. at 77).

Moreover, Ninth Circuit precedent “squarely forecloses” the claim that admission of propensity evidence violates due process. *Mejia*, 534 F.3d at 1046; *see also, e.g., Greel v. Martel*, No. 10-16847, 2012 WL 907215, 472 Fed. Appx. 503, 504 (9th Cir. 2012) (stating that “Ninth Circuit precedent ‘squarely forecloses [the] argument’ that admission of evidence of sexual misconduct to show propensity violates due process”) (quoting *Mejia*, 534 F.3d at 1046). Thus, because there is no clearly established Supreme Court law applying the corpus delicti rule to uncharged offenses or holding the admission of propensity evidence violates due process, the state court’s rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Musladin*, 549 U.S. at 77. In addition, as discussed above, the state court’s denial of this claim was not based on an unreasonable determination of the facts. The claim is therefore **DENIED**.

I. Corpus Delicti Instruction (Ground Seven)

In ground seven, Poizner claims the trial court erred by failing to instruct the jury “not to consider Poizner’s extrajudicial statements when deciding if a corpus of the uncharged crimes existed.” (Pet. at 96-97; Traverse at 32-33.) Respondent contends the claim is solely one of the application of state law and that the state court’s denial of the

///

1 claim was neither contrary to, nor an unreasonable application of, clearly established
2 Supreme Court law. (Mem. of P. & A. Supp. Answer at 39-42.)

3 Poizner raised this claim in the petition for review he filed in the California
4 Supreme Court on direct appeal. (Lodgment No. 7.) The state supreme court denied the
5 petition without citation of authority. (Lodgment No. 8.) Accordingly, this Court must
6 “look through” to the state appellate court’s decision denying the claim as the basis for its
7 analysis. *Ylst*, 501 U.S. at 805-06. That court stated as follows:

8 We otherwise decline to apply the corpus delicti rule in the context of
9 prior uncharged offenses offered under section 1108 for purposes of
10 inferring propensity. A trial court must instruct, sua sponte, on corpus
11 delicti where a defendant’s extrajudicial admission of guilt would
12 otherwise qualify as substantial evidence to support a conviction. (See
13 *People v. Najera* (2008) 43 Cal.4th 1132, 1137.) The circumstances
14 presented here do not implicate the purpose of the rule, which is to require
15 sufficient independent corroboration of the defendant’s *confessions to*
16 *crimes for which he is on trial*. “As one court explained, ‘Today’s judicial
17 retention of the [corpus delicti] rule reflects the continued fear that
18 confessions may be the result of either improper police activity or the
19 mental instability of the accused, and the recognition that juries are likely
20 to accept confessions uncritically.’ [Citation.] [¶] Viewed with this in
21 mind, the low threshold that must be met before a defendant’s own
22 statements can be admitted against him makes sense; so long as there is
23 some indication that the charged crime actually happened, we are satisfied
24 that the accused is not admitting to a crime that never occurred.” (*People*
25 *v. Jennings* (1991) 53 Cal.3d 334, 368.) Poizner was not charged with
26 crimes against Araway and Homeboy, there was no danger he would be
27 convicted of such crimes, and those uncharged offenses could not serve as
28 substantial evidence to support Poizner’s convictions. We hold the trial
court was not required to instruct the jury that the prosecution was required
to present independent proof of the acts described in Poizner’s writings,
which were admitted for the limited purpose of permitting the jury to infer
Poizner’s propensity to commit sex offenses.

26 (Lodgment No. 6 at 18.)

27 As the state court noted, and as discussed above in section IV(H) of this Order, the
28 California Supreme Court has left open the question whether the corpus delicti rule

1 applies to uncharged conduct. *See People v. Horning*, 34 Cal. 4th 871, 899 (2004);
 2 *People v. Davis*, 168 Cal. App. 4th 617, 638. Appellate courts in California have rejected
 3 the idea. *See, e.g., Davis*, 168 Cal. App. 4th at 636-38; *People v. Denis*, 224 Cal. App. 3d
 4 563, 568-570. Without any authority, either state or federal, mandating the instruction
 5 should have been given, Poizner has not established error.

6 Moreover, instructional error can form the basis for federal habeas corpus relief
 7 only if it is shown that “the ailing instruction by itself so infected the entire trial that the
 8 resulting conviction violates due process.” [citation omitted].” *Murtishaw*, 255 F.3d at
 9 971; *Henderson*, 431 U.S. at 154. The allegedly erroneous jury instruction cannot be
 10 judged in isolation. *Estelle*, 502 U.S. at 72. Rather, it must be considered in the context
 11 of the entire trial record and the instructions as a whole. *Id.* Here, any error in
 12 instructing the jury with the corpus delicti instruction with regard to the uncharged
 13 conduct did not “so infect the entire trial that the resulting conviction violates due
 14 process.” *Murtishaw*, 255 F.3d at 971. There was ample evidence of Poizner’s guilt in
 15 the form of testimony by his victims. Accordingly, the state court’s denial of this claim
 16 was neither contrary to, nor an unreasonable application of, clearly established Supreme
 17 Court law. Nor was it based on an unreasonable determination of the facts. The claim is
 18 **DENIED.**

19 J. Erroneous Admission of Evidence of Spanking (Ground Eight)

20 In ground eight, Poizner argues the trial court’s admission of evidence from his
 21 diary, in which he described engaging in sexual activities and spanking with “Homeboy”
 22 when he was eighteen and “possibly smacking his ass a couple of times before, jokingly,
 23 before he was 18, I think once” violated his due process rights. (Pet. at 98-99; Traverse
 24 at 34; Lodgment No. 2, vol. 4 at 478-79.) The evidence was admitted as propensity
 25 evidence under Evidence Code § 1108. (Lodgment No. 1, vol. 1 at 1076.) Respondent
 26 contends the state court’s resolution of this claim was neither contrary to, nor an
 27 unreasonable application of, clearly established Supreme Court law. (Mem. of P. & A.
 28 Supp. Answer at 42-44.)

Poizner raised this claim in the petition for review he filed in the California Supreme Court on direct review. (Lodgment No. 7.) That court denied the petition without citation of authority. (Lodgment No. 8.) Accordingly, this Court must “look through” to the state appellate court’s opinion denying this claim on direct appeal as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court analyzed the claim as follows:

Poizner contends the trial court denied him due process and a fair trial by admitting his writings describing the acts of spanking Homeboy, and then instructing the jury it could consider those acts as criminal sexual offenses so as to draw an inference of propensity to engage in sexual offenses. Poizner maintains the act of spanking Homeboy on his 18th birthday is not a qualifying offense under section 1108, and the error resulted in substantial prejudice in that he was “both wrongly branded a criminal based on Homeboy spanking acts, and the jury was permitted to conclude if he committed that ‘offense’ he committed the charged offenses”

The People concede the consensual spanking of Homeboy on his 18th birthday does not qualify as a sexual offense within the meaning of section 1108. Stating the trial court’s instruction was unclear as to which acts of spanking qualified under section 1108, they agree the trial court erred to the extent it instructed the jury that those acts could be considered as propensity evidence. However, they point out the evidence of these acts was nevertheless admissible under section 1101 to prove intent, common plan or scheme, or any of the other permissible inferences under that statute, and maintain the instructional error was harmless because the evidence of Poizner’s guilt – via the victims’ testimony and Poizner’s own admissions in his pretext call to Austin – was overwhelming. The People argue that there is no reasonable probability Poizner would have achieved a more favorable result absent the error.

We assess de novo whether jury instructions correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In reviewing a claim that the court’s instruction were misleading, our inquiry is whether there is a reasonable likelihood the jury misunderstood and misapplied the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.) In a noncapital case, instructional error is reviewed for prejudice under *People v. Watson, supra*, 46 Cal.2d 818. (See *People v. Gamache* (2010) 48 Cal.4th 347, 376; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) Under that standard, the

conviction may be reversed only if “ ‘after an examination of the entire cause, including the evidence’ (Cal. Const., art. VI, § 13), it appears reasonably probable’ the defendant would have obtained a more favorable outcome had the error not occurred.” (*Breverman*, at p. 178.)

We agree the instructional error, if any, is harmless. Though the propensity instruction referred generally to Poizner’s spanking of Homeboy as one of the uncharged sexual offenses without distinguishing Homeboy’s age, directly afterwards the jury was separately instructed concerning Poizner’s consensual sexual activity with Homeboy after his 18th birthday, and specifically told to exclude that evidence from its consideration of Poizner’s propensity to commit sex offenses. Thus, at most, the jury instructions were arguably contradictory and potentially misleading. However, assessing the instructions as a whole as we must (*People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088). We conclude they were reasonably clear that Poizner’s consensual sexual activity with Homeboy after he turned 18 years old was not relevant to Poizner’s disposition or inclination to commit the charged crimes, and the instructions appropriately apprised the jury that that particular consensual activity was relevant to other issues such as specific intent, plan or scheme, and witness credibility.

Further, review under *Watson*, “ ‘focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result’ ” (*People v. Moye* (2009) 47 Cal.4th 537, 556.) Poizner does not challenge the sufficiency of the evidence of his convictions, and the jury plainly accepted the victims’ testimony as to Poizner’s conduct. Additionally, as stated, Austin D’s testimony was corroborated by the pretext call introduced into evidence. Other boys corroborated some of the conduct between Poizner and Brandon. Given the ample evidence supporting Poizner’s convictions, and absent any indication the jury was confused or uncertain about Poizner’s guilt, we conclude Poizner cannot demonstrate prejudice, even if he could establish error.

(Lodgment No. 6 at 19-22.)

As previously noted, to the extent Poizner is arguing the trial court improperly applied California law in its admission of evidence, he is not entitled to relief. Federal

1 habeas relief is not available for alleged violations of state law. *Estelle*, 502 U.S. at 67-68;
 2 *see also* 28 U.S.C. § 2254(a).

3 Moreover, as discussed above, there is no clearly established Supreme Court law
 4 which holds that character or “propensity” evidence is inadmissible or violates due
 5 process, *see Estelle*, 502 U.S. at 75 n.5; *Mejia*, 534 F.3d 1036, 1046 (9th Cir. 2008);
 6 *Alberni*, 458 F.3d at 864, and Ninth Circuit has precedent “squarely forecloses” the claim
 7 that admission of propensity evidence violates due process. *Mejia*, 534 F.3d at 1046;
 8 *Greel*, 472 Fed. Appx. at 504. Thus, because there is no clearly established Supreme
 9 Court law which holds the admission of propensity evidence violates due process, the
 10 state court’s rejection of this claim was neither contrary to, nor an unreasonable
 11 application of, clearly established Supreme Court law. *Musladin*, 549 U.S. at 77.

12 Even if the evidence was wrongly admitted and the jury improperly instructed, the
 13 state court’s conclusion that any errors were harmless was neither contrary to, nor an
 14 unreasonable application of, clearly established Supreme Court law. Erroneous
 15 admission of evidence and instructional error can form the basis for federal habeas corpus
 16 relief only if it is shown that “‘the ailing instruction by itself [or the wrongly admitted
 17 evidence] so infected the entire trial that the resulting conviction violates due process.’
 18 [citation omitted].” *Murtishaw*, 255 F.3d at 971; *Henderson*, 431 U.S. at 154. Here, as
 19 the state court noted, although the jury was instructed they could consider the uncharged
 20 offenses involving Homeboy as propensity evidence, they were also explicitly instructed
 21 that they could not consider any evidence of consensual sexual activity between Poizner
 22 and Homeboy when Homeboy was an adult for that purpose. (Lodgment No. 1, vol. 1 at
 23 176-78.) A jury is presumed to follow the instructions given to it by a trial court. *Zafiro*
 24 *v. United States*, 506 U.S. 534, 540 (1993). Further, the evidence supporting Poizner’s
 25 conviction was overwhelming. Accordingly, the state court’s denial of this claim was
 26 neither contrary to, nor an unreasonable application of, clearly established Supreme Court
 27 law. Nor was it based on an unreasonable determination of the facts. The claim is
 28 **DENIED.**

1 J. Admission of Charged Offenses as Propensity Evidence (Ground Nine)

2 In claim nine, Poizner attacks the admission of the charged offenses as propensity
 3 evidence. (Pet. at 100-01; Traverse at 35-36.) Respondent counters that the state court's
 4 resolution of the claim was neither contrary to, nor an unreasonable application of,
 5 clearly established Supreme Court law. (Mem. of P. & A. Supp. Answer at 44-46.)
 6 Specifically, Respondent notes Poizner's contention that the charged crimes were
 7 improperly used as propensity evidence was resolved against him by the California
 8 Supreme Court during the pendency of his appeal and that, in any event, as discussed
 9 previously, there is no clearly established Supreme Court law which prevents the use of
 10 propensity evidence. (*Id.*)

11 Poizner raised this claim in the petition for review he filed in the California
 12 Supreme Court on direct review. (Lodgment No. 7.) That court denied the petition
 13 without citation of authority. (Lodgment No. 8.) Accordingly, this Court must "look
 14 through" to the state appellate court opinion denying the claim as the basis for its
 15 analysis. *Ylst*, 501 U.S. at 805-06. That court wrote:

16 Poizner contends the trial court prejudicially erred by instructing the
 17 jury that they could consider the charged crimes in deciding whether he had
 18 a propensity to commit other charged offense. Urging us to follow *People*
 19 *v. Quintanilla* (2005) 132 Cal.App.4th 572 (*Quintanilla*), Poizner
 20 maintains section 1108 does not authorize the use of currently charged
 21 offenses to convict a defendant of other charged crimes, and to use such
 22 charged offenses in this manner "interferes with the trial court's right to
 23 exclude the propensity evidence under section 352, the linchpin which
 24 wave this statute from being violative of due process." Poizner argues that
 25 as a result, the instruction reduced the People's burden of proof, denied him
 26 his right to a jury trial, and violated his right to due process. He notes the
 27 issue at hand – whether jurors could consider charged offense as propensity
 28 evidence under section 1108 – was on review in the California Supreme
 Court.

Following the completion of briefing in this matter, the high court in
People v. Villatoro (2012) 54 Cal.4th 1152 resolved the question in the
 People's favor. In *Villatoro*, the court observed that section 1108 by its
 terms did not distinguish between charged or uncharged sexual offense, but

1 refers to “ ‘another sexual offense or offenses.’ ” (*Id.* at p. 1160.) The
 2 court stated, “This definition of ‘another’ contains no limitation, temporal
 3 or otherwise, to suggest that section 1108 covers only offenses other than
 4 those for which the defendant is currently on trial.” (*Id.* at p. 1161.) Nor
 5 did the statute’s qualifying language concerning section 352 mandate that
 6 the sexual offense be uncharged. (*Ibid.*) Disapproving *Quintanilla* on that
 7 point, the court in *Villatoro* concluded that nothing in the language or
 8 legislative history restricted the application of section 1108 to uncharged
 9 offenses. (*Villatoro*, 54 Cal.4th at pp. 1163, fn. 5, 1164.)

10 The court in *Villatoro* proceeded to consider whether the trial court
 11 had erred by instructing the jury with a modified version of CALCRIM No.
 12 1191 similar to the instruction given in the present case [footnote omitted],
 13 and the defendant’s argument that the modified instruction failed to clearly
 14 designate the standard of proof that applied to the charged offenses.
 15 (*People v. Villatoro*, *supra*, 54 Cal.4th at p. 1167.) The defendant in
 16 *Villatoro* contended that a juror could have used any standard of proof, or
 17 none, to convict him, depriving him of the presumption of innocence. The
 18 court rejected these arguments, pointing out “the instruction clearly told the
 19 jury that all offenses must be proven beyond a reasonable doubt, even those
 20 used to draw an inference of propensity. Thus, there was no risk the jury
 21 would apply an impermissibly low standard of proof.” (*Id.* at p. 1168.) It
 22 pointed out the trial court had also instructed the jury with CALCRIM No.
 23 220, which “defines the reasonable doubt standard and reiterates that the
 24 defendant is presumed innocent; it also explains that only proof beyond a
 25 reasonable doubt will overcome that presumption.” (*Ibid.*) Thus, the
 26 modified instruction did not impermissibly lower the standard of proof or
 27 otherwise interfere with defendant’s presumption of innocence. (*Ibid.*)

28 Finally, the court rejected the defendant’s argument that the trial court
 in that case had not undertaken a section 352 analysis before giving the
 modified instruction. (*People v. Villatoro*, *supra*, 54 Cal.4th at p. 1168.) It
 held the record reflected the trial court implicitly conducted such an
 analysis as it properly could, but that any error in its failure to do so was
 harmless in view of the striking similarity of the various prior offenses and
 their high probative value, which substantially outweighed any prejudice.
 (*Id.* at pp. 1168-1169.)

Villatoro disposes of Poizner’s arguments as to the instructions impact
 on the People’s burden of proof, on which his due process and jury trial
 claims are based. Moreover, it is plain from the record here that the trial

1 court, as in *Villatoro*, implicitly if not expressly made a section 352 analysis
 2 of the prior offenses before permitting them to be used as evidence under
 3 section 1108. In reviewing this particular jury instruction, the court stated
 4 in part: “The discussion was that 1108 only applies to other uncharged
 5 crimes and [*People v. Wilson* (2008) 166 Cal.App.4th 1034] talks about the
 6 fact that it applies as well to other charged crimes. The jury can
 7 appropriately use those as propensity evidence under 1108 when they’re
 8 evaluating each of those crimes essentially if the crimes are cross-
 9 admissible, if they’re relevant, if they’re admissible under 1108, *and I*
 10 *believe that I’ve already made that determination when we first argued the*
 11 *case for consolidation, . . . each [of the crimes] were similar enough*
 regarding the age of the boys, the circumstances of the molests, the type of
 touching, that they would be cross-admissible.” (Italics added.) The record
 reflects an adequate section 352 weighing process, not mere reliance on
People v. Wilson, supra, 166 Cal.App.4th 1034, to admit the charged
 crimes as evidence.

12 (Lodgment No. 6 at 22-25.)

13 As noted above, to the extent Poizner is attacking the state court’s interpretation
 14 and application of its own rules of evidence, he is not entitled to relief. *Estelle*, 502 U.S.
 15 67-68. In any event, it appears the trial court did not err by admitting charged offenses as
 16 propensity evidence and so instructing the jury. *See Villatoro*, 54 Cal. 4th at 1160-68.
 17 Moreover, as previously discussed, there is no clearly established Supreme Court law
 18 which holds that character or “propensity” evidence is inadmissible or violates due
 19 process. Indeed, the Supreme Court expressly reserved deciding that issue in *Estelle*, 502
 20 U.S. at 75 n.5. *See Mejia*, 534 F.3d at 1046; *Alberni*, 458 F.3d at 864; *see also, e.g.,*
 21 *Greel*, 472 Fed. Appx. at 504. Thus, because there is no clearly established Supreme
 22 Court law which holds the admission of propensity evidence violates due process, the
 23 state court’s rejection of this claim was neither contrary to, nor an unreasonable
 24 application of, clearly established Supreme Court law. *Musladin*, 549 U.S. at 77.
 25 Accordingly, the state court’s denial of this claim was neither contrary to, nor an
 26 unreasonable application of, clearly established Supreme Court law. Nor was it based on
 27 an unreasonable determination of the facts. The claim is therefore **DENIED**.

28 ///

1 K. Admission of Evidence of Poizner's Sexual Orientation, Consensual Homosexual
 2 Acts and Possession of Homosexual Pornography (Grounds Ten and Eleven)

3 Poizner next contends the trial court improperly admitted evidence of his
 4 homosexuality, consensual homosexual sexual activity, and possession of homosexual
 5 pornography, thereby violating his due process rights. (Pet. at 102-10; Traverse at 37-
 6 38.) Specifically, Poizner argues his sexual orientation and consensual homosexual
 7 activity was irrelevant and prejudiced the jury, the pornographic DVD depicting
 8 homosexual sexual activity between adults was irrelevant because there was no
 9 connection between the sexual activity, the pornographic DVD and the crimes alleged,
 10 and the trial court should have excluded the evidence under Evidence Code § 352. (Pet.
 11 at 102-13; Traverse at 37-38.) Respondent contends the state court's resolution of these
 12 claims was neither contrary to, nor an unreasonable application of, clearly established
 13 Supreme Court law, and, to the extent Poizner challenges the application of state law, he
 14 is not entitled to relief. (Mem. of P. & A. Supp. Answer at 46-49.)

15 Poizner raised this claim in the petition for review he filed on direct appeal in the
 16 California Supreme Court. (Lodgment No. 7.) That court denied the petition without
 17 citation of authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to
 18 the state appellate court's opinion as the basis for its analysis. *Ylst*, 501 U.S. at 805-06.
 19 That court thoroughly analyzed the claim as follows:

20 Poizner contends the trial court violated his right to due process and a
 21 fair trial by admitting evidence that he had told Brandon's mother he was
 22 gay, as well as evidence he possessed a pornographic DVD cover depicting
 23 graphic, sexually explicit acts (oral copulation) between youthful-looking
 24 adult men and containing a brief but prurient description on the back of the
 25 cover. [FN 5: Counsel read the summary to the court, reminding it the
 26 DVD cover was going to be back with the jury during deliberations: "I'm
 27 just reading the back of this. This is going back to the jury – an incredible
 28 18-year-old's sexual twinkfest." It says, 'Kenny Rose and David Fire are
 also lean hairless lads who are horny and insatiable. The uninhibited sex
 from these big dick teens has to be seen to be believed. Great cock-sucking,
 rimming and fucking produce volumes, load, of thick teen spunk and
 explode everywhere.'"] The text appears on the upper left hand corner of

1 the back of the DVD cover in 18-character-per-inch type.] He argues
 2 neither his sexual orientation nor the DVD jacket were logically relevant to
 3 the crimes of lewd conduct with children, and they were not relevant under
 4 section 1101 to prove intent, common plan or scheme, or to evaluate
 5 witness credibility. Poizner maintains that to the extent the evidence had
 6 some degree of relevance, the court abused its discretion by failing to
 7 exclude it as unduly prejudicial under section 352. According to Poizner,
 these errors, combined with the court's instruction to the jury that it could
 consider this evidence to determine his intent, plan or scheme to commit
 the offenses or evaluate witness credibility, requires reversal.

8

9
 10 *B. Evidence of Poizner's Sexual Orientation*

11 Before trial, Poizner moved in limine to exclude evidence of his sexual
 12 orientation, specifically evidence that he had told the boys or a parent he
 13 was gay or bisexual. The prosecutor argued the evidence was relevant to
 14 Poizner's intent, sexual interest and motivation to be around boys, and also
 15 because he had used that fact about himself to gain the parents' trust.
 16 Though the trial court observed there was potential prejudice, it found there
 17 was substantial relevance to the evidence that Poizner had a sexual interest
 18 in people of the same sex, and was also part of Poizner's grooming
 19 behavior. In part, it reasoned, "I totally agree with the label of being
 20 homosexual is potentially prejudicial. And as I said, in the vast majority of
 21 cases, I think, would have absolutely no relevance. I also think that there
 22 is a potential for jurors to equate homosexuality with pedophilia and that's
 – I mean I would be happy to allow you to put on an expert to say that that's
 absolutely not true. But I also see the potential prejudice. There is no
 question. I also see a very substantial relevance. I mean, talk to anybody
 on the street and you ask them if they think it's relevant, and if a man is
 accused of molesting boys, whether or not he's homosexual or
 heterosexual, they will tell you, yes, it's relevant."

23
 24 Accordingly, at trial, Austin testified that on one occasion after
 25 Poizner took him home, Poizner sat down and introduced himself to
 26 Austin's mother, telling her, "I don't want you to hear from anybody else,
 27 but I'm gay, but I'm into stable, steady relationships. And I'm not into,
 28 like, the teenagers or the boys, or anything.' "

///

1 There is no question that evidence of a defendant's sexual preference
 2 can be highly prejudicial if it is irrelevant to the charged crime. (*U.S. v.*
 3 *Yazzie* (9th Cir. 1995) 59 F.3d 807, 813; see *U.S. v. Gillespie* (9th Cir. 1988)
 4 852 F.2d 475, 478-479 [holding evidence of homosexuality is extremely
 5 prejudicial and trial court erred in admitting evidence of defendant's
 6 homosexual relationship as it neither proved nor disproved that the
 7 appellant committed child molestation; reversing conviction for
 8 transportation of a person in interstate commerce for illegal sexual
 9 purposes]; *Cohn v. Papke* (9th Cir. 1981) 655 F.2d 191, 194 [possibility of
 10 prejudicial effect of evidence of homosexuality is great since jury may be
 11 influenced by biases and stereotypes; evidence of prior homosexual
 12 experiences of plaintiff in civil rights case against police had minimal
 13 probative value regarding whether he solicited an act of prostitution]; *U.S.*
 14 *v. Birrell* (9th Cir. 1970) 421 F.2d 665, 666 [reversing a conviction for
 15 interstate transportation of a stolen motor vehicle due to the prosecutor's
 16 statements urging the jury to convict the defendant and not "turn him loose
 17 on society" because he was homosexual]; *State v. Bates* (1993) 507 N.W.
 18 2d 847, 850, 852 [evidence of defendant's sexual orientation was improper
 19 character evidence; whether the defendant was sexually attracted to adult
 20 men was irrelevant to whether he was sexually interested in his 8 and 12-
 21 year-old victims].) The Ohio Supreme Court has said: "[T]he modern
 22 understanding of pedophilia is that it exists wholly independently from
 23 homosexuality. The existence or absence of one neither establishes nor
 24 disproves the other. 'The belief that homosexuals are attracted to
 25 prepubescent children is a baseless stereotype.' . . . Thus, evidence of
 26 homosexuality is not relevant to establish pedophilia." (*State v. Crotts*
 27 (Ohio 2004) 820 N.E.2d 302, 306.) However, exclusion is required only
 28 where the evidence's unfair prejudice *substantially outweighs* its probative
 value. (§ 352; *U.S. v. Yazzie*, 59 F.3d at pp. 811-812.)

1 We perceive no manifest abuse of discretion in the trial court's
 2 admission of this evidence. In this case, Poizner's homosexuality was not
 3 collateral to the issues. Poizner's remark to Austin's mother about his
 4 sexual preference and assurance he was not attracted to teenagers or boys
 5 was part of Austin's trial testimony, and it tended to show Poizner's plan
 6 or scheme to reassure parents and gain access to the boys while concealing
 7 his true intentions. This is a permissible use of such evidence, no matter
 8 how the evidence may reflect on the defendant. (§ 1101, subd. (b); *People*
 9 *v. Mullen* (1953) 115 Cal.App.2d 340, 342-343 [evidence of homosexual
 10 tendencies of the male defendant was relevant to charge of assault, where
 11 prosecution's theory at trial was that the male victim of the assault was

1 interfering with the defendant's relationship with another man]; *People v.*
2 *Helwinkel* (1962) 199 Cal.App.2d 207, 214 [citing *Mullen* for the
3 proposition that evidence of homosexual tendencies of the defendant was
4 relevant to show motive].)

5 We need not analyze further whether the court's section 352 ruling on
6 this point was an abuse of discretion, because even assuming error, under
7 the circumstances, the introduction of this evidence was harmless. The
8 prosecutor did not use the evidence of Poizner's homosexuality in a
9 repeated or inflammatory way. At one point in closing arguments, she
10 referred briefly to Poizner's homosexuality in telling the jurors –
11 appropriately – they could consider that and other circumstances to decide
12 whether Poizner's touchings were sexually motivated. [FN 6: omitted]. At
13 another point she recounted the testimony of Poizner's female roommate,
14 who said Poizner had heterosexual pornography and she thought it “a little
15 odd because he's gay.” At no point did the prosecutor make remarks
16 suggesting that Poizner's sexual preference disposed him to a sexual desire
17 for adolescent boys. Indeed, as we have set out above, the trial court gave
18 a curative instruction to the jury that it was not to consider Poizner's sexual
19 preference on the question of his disposition or inclination to commit the
20 charged offenses. We presume the jurors followed that instruction absent
21 any contrary indication. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) And
22 the trial evidence concerning Poizner's sexual preference was not more
23 inflammatory than the evidence from the victims of the lewd touchings.

24 Further, as we have already observed, the evidence against Poizner is
25 abundant and strong. He has not challenged the sufficiency of the evidence
26 of his convictions, and the victims testified directly, specifically and
27 unequivocally about the offenses. None of their testimony was physically
28 impossible of inherently lacking in credibility, and Austin's was
corroborated by Poizner's own incriminating admissions. The victims'
testimony, believed by the jury, was sufficient to exclude any chance that
the admission of the evidence contributed to Poizner's convictions.
Accordingly, under the state law *Watson* standard of error in admitting
evidence we cannot say it is reasonably probable the verdict would have
been more favorable to Poizner absent any assumed error. (*People v.*
Partida (2005) 37 Cal.4th 428, 439.) Nor can we say federal due process
was offended. Given the limited use of the evidence and brief trial
reference to it, admission of the evidence did not render the trial
fundamentally unfair. (*Ibid.*)

1 C. *The DVD Cover*

2 As for its decision to admit the DVD cover found in Poizner's
3 possession, the trial court reasoned in part: "I do recognize that there is
4 some prejudice to seeing the pictures. They're not particularly pleasant
5 pictures. [¶] But there's no question that the defense in this case has been
6 to challenge the credibility of each of these boys, that they're making this
7 up for all sorts of various reasons, to even challenge the credibility of Mr.
8 Araway, and that if the defendant's a homosexual, he's a homosexual
9 interested in adults, not children, and this video, his possession of it,
10 appears to support an inference that he does have a sexual interest in young-
11 looking men. They may be adult men, but they look like teenage boys. [¶]
12 How they look – I don't particularly like the idea of the jury's seeing the
13 sex acts, but looking at the age of the boys in this video or on the cover of
14 the video is unfortunately very probative."

15 Poizner acknowledges that in *People v. Page*, *supra*, 44 Cal.4th 1, the
16 California Supreme Court reaffirmed the potential relevance of evidence of
17 a defendant's possession of sexual images on the issue of intent. It
18 explained: "In *People v. Memro* (1995) 11 Cal.4th 786 . . . (*Memro*)
19 [abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610,
20 639, fn. 18], the defendant was charged with first degree felony murder
21 based upon a violation of [Penal Code] section 288, which prohibits the
22 commission of a lewd a lascivious act upon a child who is under the age of
23 14 years. The defendant in *Memro* enjoyed taking photographs of young
24 boys in the nude, and he had escorted his victim, seven years of age, to the
25 defendant's apartment with the intent of taking photographs of the victim
26 in the nude. When the victim said he wanted to leave, the defendant
27 strangled him and attempted to sodomize his dead body. The trial court
28 admitted magazines and photographs possessed by the defendant
containing sexually explicit stories, photographs and drawings of males
ranging in age from prepubescent to young adult. We concluded the trial
court did not abuse its discretion, because 'the photographs, presented in
the context of defendant's possession of them, yielded evidence from which
the jury could infer that he had a sexual attraction to young boys and
intended to act on that attraction. [Citation.] The photographs of young
boys were admissible as probative of defendant's intent to do a lewd or
lascivious act with [the victim].' " (*People v. Page*, 44 Cal.4th at p. 40.)

Poizner apparently seeks to distinguish *Page* and *Memro*, arguing the
DVD here is "wholly and utterly irrelevant" under any theory because there

1 is no connection between the DVD jacket reflecting actions between adults
 2 and the charged crimes, and because none of the victims were shown the
 3 DVD. We disagree. The question is whether the images of young males
 4 orally copulating each other permitted the jury to draw an inference of
 5 Poizner's sexual interest in young boys or engage in touchings with lewd
 6 intent in violation of Penal Code section 288. Though the DVD jacket may
 7 actually have depicted adult males on the cover, their appearance is easily
 8 that of adolescent boys, and thus it is probative on the question of Poizner's
 9 sexual motivation in his contact with the young victims. Importantly, "[t]he
 10 least degree of similarity (between the uncharged act and charged offense)
 11 is required" to prove the defendant's mental state, such as his intent.
 12 (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

13 And while the DVD cover is prurient, graphic and portrays sexually
 14 explicit conduct beyond what occurred in the present case, we cannot say
 15 it is unduly prejudicial. Prejudicial evidence, as referred to in section 352,
 16 is that which " "tends to evoke an emotional bias against defendant as an
 17 individual and which has very little effect on the issues. In applying section
 18 352, 'prejudicial' is not synonymous with 'damaging' " " " (*People v.*
 19 *Miramontes* (2010) 189 Cal.App.4th 1085, 1098, quoting *People v. Bolin*
 20 (1998) 18 Cal.4th 297, 320.) It is "not the prejudice or damage to a defense
 21 that naturally flows from relevant, highly probative evidence." (*People v.*
 22 *Karis* (1988) 46 Cal.3d 612, 638.) In *Memro*, the defendant argued that
 23 sexually graphic magazines and pictures of young boys was barred by
 24 section 352. (*People v. Memro, supra*, 11 Cal.4th at p. 864.) But the court
 25 found no abuse of discretion, stating, "To be sure, some of this material
 26 showed young boys in sexually graphic poses [and] [i]t would undoubtedly
 27 be disturbing to most people. But we cannot say that it was substantially
 28 more prejudicial than probative, for its value in establishing defendant's
 intent to violate [Penal Code] section 288 was substantial." (*Ibid.*) Here,
 Poizner's conduct at times went beyond mere hugs and massages, he
 rubbed Austin's genitals and offered to orally copulate him twice, which is
 the sort of activity reflected on the DVD cover.

29 Thus, though the DVD cover was capable of engendering antipathy
 30 towards Poizner, this did not substantially outweigh its probative value,
 31 both as to Poizner's lewd intent and to the victims' credibility, which was
 32 the central theme of Poizner's defense. [FN 7 omitted.] Poizner sought to
 33 characterize his conduct as innocent, and thus evidence tending to show his
 34 touchings were done with the requisite lewd intent, even though the acts
 35 themselves may not have been lewd, was highly relevant. (See *People v.*

1 *Martinez* (1995) 11 Cal.4th 434, 444 [Penal Code section 288 “prohibits *all*
 2 forms of sexually motivated contact with an underage child. Indeed, the
 3 ‘gist’ of the offense has always been the defendant’s intent to sexually
 4 exploit a child, not the nature of the offending act”].) In sum, the trial court
 5 did not manifestly abuse its discretion in finding probative value to the
 DVD cover, and concluding its probative value was not outweighed by its
 prejudicial impact.

6 (Lodgment No. 6 at 25-36.)

7 As with Poizner’s other claims involving the erroneous admission of evidence, to
 8 the extent he claims the trial judge improperly applied state evidentiary law and thus the
 9 evidence should not have been admitted, he is not entitled to relief. *Estelle*, 502 U.S. at
 10 67-68; *see also* 28 U.S.C. § 2254(a). Simply claiming that a state court’s improper
 11 application of state law violated a petitioner’s due process rights does not transform the
 12 claim into a federal one. *Langford*, 110 F.3d at 1389.

13 In addition, as previously noted, “[a]lthough the [Supreme] Court has been clear
 14 that a writ should be issued when constitutional errors have rendered the trial
 15 fundamentally unfair (citation omitted), it has not yet made a clear ruling that admission
 16 of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient
 17 to warrant issuance of the writ,” and thus “under AEDPA, even clearly erroneous
 18 admissions of evidence that render a trial fundamentally unfair may not permit the grant
 19 of federal habeas corpus relief if not forbidden by ‘clearly established Federal law,’ as
 20 laid out by the Supreme Court.” *Holley*, 568 F.3d at 1101; *see also Greel*, 472 Fed.
 21 Appx. at 504.

22 In any event, the admission of evidence of Poizner’s sexual orientation, consensual
 23 homosexual acts and possession of homosexual pornography, and the jury instructions
 24 associated with that evidence, did not render his trial fundamentally unfair. *Estelle*, 502
 25 U.S. at 67. Poizner admitted he was bisexual in the pretext phone call Austin made to
 26 him. (Lodgment No. 1, vol. 1 at 0137.) The prosecution did not focus on Poizner’s
 27 sexuality in questioning witnesses or in closing argument, and did not argue that
 28 Poizner’s sexuality made him guilty of the crimes. (Lodgment No. 2, vol. 7 at 1063-

1 1110, 1139-51.) The evidence of Poizner's consensual homosexual acts with
 2 "Homeboy" was brief and, in the context of the trial as a whole where multiple victims
 3 testified about Poizner's sexual crimes, did not render the trial fundamentally unfair. The
 4 DVD cover, while graphic, was no more disturbing than the live testimony from the
 5 multiple young victims who testified about Poizner's actions. Further, the jury was
 6 instructed they could not consider evidence of Poizner's sexuality, consensual
 7 homosexual acts, and possession of homosexual pornography as evidence he was
 8 "disposed or inclined" to commit the offenses and only for the limited purpose of
 9 determining Poizner's intent and whether he had a plan or scheme to commit the charged
 10 offenses. Poizner's homosexuality and interest in homosexual pornography that depicted
 11 young men who looked like teenaged boys engaging in sex was relevant to that inquiry.

12 In sum, there is no clearly established Supreme Court law which forbids the
 13 admission of prejudicial evidence, and the evidence Poizner complains of did not render
 14 his trial fundamentally unfair. Accordingly, the state court's denial of this claim was
 15 neither contrary to, nor an unreasonable application of, clearly established Supreme Court
 16 law. *Williams*, 529 U.S. at 412-13. Nor was it based on an unreasonable determination
 17 of the facts. Poizner is not entitled to relief as to this claim, and it is therefore **DENIED**.

18 L. Ineffective Assistance of Counsel (Subclaims of Grounds One and Three)

19 Poizner contends trial counsel was ineffective when he failed to obtain Brandon's
 20 psychiatric records and failed to present character witnesses. (Pet. at 46-47, 62-63, 94-
 21 95; Traverse at 11-18, 22-25.) Respondent argues the state court's denial of these claims
 22 were neither contrary to, nor an unreasonable application of, clearly established Supreme
 23 Court law. (Mem. of P. & A. Supp. Answer at 25-26.)

24 Poizner raised his ineffective assistance of counsel claims in the petition for review
 25 he filed in the California Supreme Court challenging the appellate court's denial of his
 26 petition for writ of habeas corpus. (Lodgment No. 12.) The California Supreme Court
 27 rejected this claim without citation of authority. (Lodgment No. 13.) Accordingly, this
 28 Court must "look through" to the state appellate court's opinion denying the claim as the

1 basis for its analysis. *Ylst*, 501 U.S. at 805-06. That court analyzed the claims as
 2 follows:

3 Also without merit is Poizner's related claim that his trial counsel "rendered
 4 ineffective assistance by inexplicably failing to get Brandon's and/or
 5 Austin's critical psychiatric records." Poizner has made no showing that
 6 trial counsel knew or should have known of the records but took no steps
 7 to obtain them, that the records contained relevant evidence, and that there
 8 was a reasonable probability of a more favorable outcome had the records
 been introduced at trial. (*Strickland v. Washington* (1984) 466 U.S. 668,
 694 (*Strickland*); *In re Clark, supra*, at p. 766.)

9

10 Poizner's related complaint[] that trial counsel provided ineffective
 11 assistance by failing to call character witnesses . . . [has] no merit. Trial
 12 counsel stated in a declaration: "Most damaging to the defense case would
 13 be the court allowing the prosecutor to inquire from character witness[es]
 14 whether or not uncharged acts referred to in the journal would impact their
 15 testimony. [¶] Based upon the trial court's rulings and indications
 16 regarding the scope of cross[-]examination of character witnesses, I
 17 decided that it was not in [Poizner's] interest to present character evidence."
 18 The decision not to call character witnesses for "fear that otherwise
 inadmissible bad character evidence could be used by the prosecution in
 rebuttal . . . was certainly a reasonable one and was well within the range
 of reasonable competence." (*People v. Miranda* (1987) 44 Cal.3d 57, 121.)

19 (Lodgment No. 11 at 2-3.)

20 To establish ineffective assistance of counsel, a petitioner must first show his
 21 attorney's representation fell below an objective standard of reasonableness. *Strickland*
 22 *v. Washington*, 466 U.S. 668, 688 (1984). "This requires showing that counsel made
 23 errors so serious that counsel was not functioning as the 'counsel' guaranteed the
 24 defendant by the Sixth Amendment." *Id.* at 687. He must also show he was prejudiced
 25 by counsel's errors. *Id.* at 694. Prejudice can be demonstrated by a showing that "there
 26 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
 27 proceeding would have been different. A reasonable probability is a probability
 28 sufficient to undermine confidence in the outcome." *Id.*; see also *Fretwell v. Lockhart*,

1 506 U.S. 364, 372 (1993). Further, *Strickland* requires that “[j]udicial scrutiny of
 2 counsel’s performance . . . be highly deferential.” *Strickland*, 466 U.S. at 689. There is a
 3 “strong presumption that counsel’s conduct falls within a wide range of reasonable
 4 professional assistance.” *Id.* at 686-87. The Court need not address both the deficiency
 5 prong and the prejudice prong if the defendant fails to make a sufficient showing of either
 6 one. *Id.* at 697.

7 “Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*,
 8 559 U.S. 356, 371 (2010). “The standards created by *Strickland* and section 2254(d) are
 9 both highly deferential and when the two apply in tandem, review is ‘doubly’ so.”
 10 *Harrington v. Richter*, 562 U.S.86 (2011) (citations omitted). These standards are
 11 “difficult to meet” and “demand[] that state court decisions be given the benefit of the
 12 doubt.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Federal habeas relief functions
 13 as a “guard against extreme malfunctions in the state criminal justice systems,” and not
 14 simply as a means of error correction. *Richter*, 562 U.S. at 102-03 (quoting *Jackson v.*
 15 *Virginia*, 443 U.S. 307, 332 n.5 (1979). “Representation is constitutionally ineffective
 16 only if it ‘so undermined the proper functioning of the adversarial process’ that the
 17 defendant was denied a fair trial.” *Strickland*, 466 U.S. at 687.

18 As to Poizner’s claim that counsel was ineffective for failing to obtain and
 19 introduce psychiatric records, Poizner has not established either deficient performance or
 20 prejudice. *Id.* at 688, 694. As to Brandon’s psychiatric records, there is no evidence that
 21 counsel failed to obtain Brandon’s psychiatric records. Counsel may have obtained them,
 22 then made a strategic decision not to use them. In any event, as discussed above in
 23 section IV(C) of this Order, had defense counsel introduced Brandon’s psychiatric
 24 records from Second Chance, the prosecution would have likely called Brandon’s
 25 therapists as witnesses, who would have testified regarding their misgivings about
 26 Brandon’s relationship with Poizner, the concept of “grooming,” and the fact that
 27 molestation victims often deny the molestation at first. That evidence would have been
 28 detrimental, not helpful, to Poizner’s case. As to Austin’s psychiatric records, Austin

1 testified extensively on direct and cross examination about his psychological issues,
2 admitting he cut himself both before and after Poizner's abuse, purposely beat himself up
3 on one occasion in order to falsely accuse his mother's boyfriend of battery, admitting he
4 was "manic" and was on medication for having bipolar disorder, admitting he had gotten
5 kicked out of his rehabilitation program, that he was suspended from school and had gone
6 to juvenile hall. (Lodgment No. 2, vol. 3 at 252, 253, 264, 266.) Poizner has not
7 established what further information about Austin's psychological state was contained in
8 his psychiatric records and how that information would have helped his defense.

9 Counsel was also not ineffective for failing to introduce character witnesses. As
10 discussed above in section IV(E), had defense counsel introduced such witnesses,
11 extremely damaging evidence from Poizner's diary would have been presented to the
12 jury. As the trial judge noted during the motions hearing excluding some of the diary
13 entries, "I am persuaded that if jurors heard this evidence about him sneaking into homes
14 and molesting children while they sleep it would be game over." (Lodgment No. 2, vol. 1
15 at 38.) Trial counsel also stated in a declaration attached to the petition for writ of habeas
16 corpus Poizner filed in San Diego Superior Court that while he intended to present
17 character evidence, the trial court's ruling permitting the prosecution to introduce
18 damaging evidence from Poizner's diary made it strategically unwise to present such
19 evidence. (Lodgment No. 9, Ex. H.) "[S]trategic choices made after thorough
20 investigation of law and facts relevant to plausible options are virtually unchallengeable."
21 *Strickland*, 466 U.S. at 691.

22 For the foregoing reasons, the Court concludes the state court's resolution of
23 Poizner's ineffective assistance of trial counsel claims was neither contrary to, nor an
24 unreasonable application of, clearly established Supreme Court law, and was not based
25 on an unreasonable determination of the facts. *Williams*, 529 U.S. at 412-13. The claim
26 is **DENIED**.

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1 M. Ineffective Assistance of Appellate Counsel (Subclaims of Grounds Three, Four,
 2 and Five)

3 Poizner contends appellate counsel was ineffective for failing to raise claims three
 4 (trial counsel's failure to introduce character evidence), four (the trial court's modified
 5 instruction on the allegations lowered the prosecution's burden of proof) and five
 6 (Poizner's sentence violates the Eighth Amendment) on direct appeal. (Pet. at 63-64, 72,
 7 78; Traverse at 22-25, 26-28, 29.) Respondent contends the state court's adjudication of
 8 the claims is neither contrary to, nor an unreasonable application of, clearly established
 9 Supreme Court law. (Mem of P. & A. Supp. Answer at 33, 36, 39.)

10 Poizner raised these claims in the petition for review he filed in the California
 11 Supreme Court challenging the denial of his habeas corpus petition by the state appellate
 12 court. (Lodgment No. 12.) That court denied the petition without citation of authority.
 13 (Lodgment No. 13.) Accordingly, this Court must "look through" to the state appellate
 14 court's opinion denying the claims as the basis for its analysis. *Ylst*, 501 U.S. at 805-06.

15 As to trial counsel's failure to introduce character evidence, the state appellate
 16 court concluded that "appellate counsel was not ineffective for failing to challenge the
 17 trial court's evidentiary ruling, which was clearly correct. (*People v. Constancio* (1974)
 18 42 Cal.App.3d 533, 546 (*Constancio*) [counsel not required to make meritless
 19 argument].) (Lodgment No. 11 at 3.) As to the jury instruction question, the state
 20 appellate court, citing *Constancio*, noted that "[t]he trial court . . . was not required to tell
 21 the jury four separate times . . . that the People had to prove the allegation beyond a
 22 reasonable doubt, and appellate counsel did not provide ineffective assistance by not
 23 arguing otherwise on appeal." (*Id.* at 4.) As to Poizner's claim that appellate counsel
 24 was ineffective because he failed to raise an Eighth Amendment challenge to his
 25 sentence, the state appellate court found as follows:

26 We also reject Poizner's related claim of ineffective assistance of appellate
 27 counsel. In light of the line of cases cited above — which Poizner's
 28 appellate counsel accurately described as "overwhelmingly unfavorable on
 the merits" in response to counsel's query as to why a cruel and/or unusual

1 punishment challenge was not made on appeal — and the strong evidence
 2 that Poizner repeatedly molested three vulnerable victims, we cannot
 3 conclude “appellate counsel failed to raise crucial assignments of error
 4 which arguably might have resulted in reversal, thereby depriving [Poizner]
 of effective assistance of counsel to which he was constitutionally entitled.”
 (*People v. Long* (1974) 11 Cal.3d 134, 142.)

5
 6 (Lodgment No. 11 at 4-5.)

7 The standard of review for claims of ineffective assistance of appellate counsel is
 8 the same as that for trial counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (citing
 9 *Smith v. Murray*, 477 U.S. 527, 535-36 (1986)). A petitioner must first show that his
 10 appellate counsel’s performance fell below an objective standard of reasonableness.
 11 *Strickland*, 466 U.S. at 688. He must then establish he was prejudiced by counsel’s
 12 errors. *Id.* at 694. To establish prejudice in the context of ineffective assistance of
 13 appellate counsel, a petitioner must demonstrate that he would have prevailed on appeal
 14 absent counsel’s errors. *Smith*, 528 U.S. at 285. Appellate counsel is not required to raise
 15 frivolous or meritless claims on appeal. *Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir.
 16 2012).

17 The state appellate court correctly analyzed Poizner’s ineffective assistance of
 18 appellate counsel’s claims. Appellate counsel told Poizner’s habeas counsel he did not
 19 challenge the trial court’s ruling on the admissibility of character evidence because he
 20 concluded the ruling was correct, though he also stated that since he challenged the
 21 admissibility of other portions of Poizner’s diary, he “probably should have done the
 22 same with [those] portions of the diaries.” (Lodgment No. 9, Ex. I.) As noted above,
 23 appellate counsel is not required to raise frivolous or meritless claims on appeal. *Jones*,
 24 691 F.3d at 1101. Appellate counsel’s statements indicate he did not raise the character
 25 evidence claim because he at least initially believed it was meritless. And, though he
 26 later indicated he “probably should have” raised the claim since he was raising other
 27 claims related to the admission of evidence from Poizner’s diaries, as discussed in section
 28 IV(E) of this Order, his initial analysis was correct, and Poizner would not have prevailed

1 on appeal had appellate counsel raised this claim. *Smith*, 528 U.S. at 285. Thus, Poizner
 2 has not established either that appellate counsel's failure to challenge the trial court's
 3 ruling on the admissibility of character evidence was objectively unreasonable
 4 representation, or that he was prejudiced by appellate counsel's failure to do so. *Id.*

5 Appellate counsel also did not render ineffective assistance by failing to raise a
 6 challenge to the reasonable doubt jury instructions for the allegations. As discussed in
 7 section IV(F) of this Order, the jury instructions properly and sufficiently advised the jury
 8 of the necessity to find each and every allegation to be true beyond a reasonable doubt,
 9 and thus the claim is meritless. *Jones*, 691 F.3d at 1101. Because the claim is meritless,
 10 there is no likelihood Poizner would have prevailed on appeal had appellate counsel
 11 raised the claim. *Smith*, 528 U.S. at 285.

12 Finally, appellate counsel did not render ineffective assistance by failing to raise
 13 and Eighth Amendment challenge to Poizner's sentence. Appellate counsel told
 14 Poizner's habeas corpus counsel he did not raise an Eighth Amendment claim because
 15 "the law was overwhelmingly unfavorable on the merits." Indeed, as discussed in section
 16 IV(G) of this Order, this Court agrees Poizner's sentence does not violate the Eighth
 17 Amendment. Because the claim is meritless, Poizner has not established either that
 18 counsel erred by failing to raise the claim, or that he was prejudiced by such failure.
 19 *Jones*, 691 F.3d at 1101; *Smith*, 528 U.S. at 285. Accordingly, the state court's denial of
 20 this claim was neither contrary to, nor an unreasonable application of, clearly established
 21 Supreme Court law, and was not based on an unreasonable determination of the facts.
 22 The claim is **DENIED**.

23 N. Cumulative Error (Ground Twelve)

24 Poizner contends the cumulative effect of the errors at Poizner's trial violated his
 25 federal due process and fair trial rights. (Pet. at 111-12; Traverse at 32.) Respondent
 26 argues first that there is no clearly established Supreme Court law establishing that
 27 cumulative error is a federal constitutional error, and that alone precludes relief. (Mem.
 28 of P. & A. Supp. Answer at 49-51.) In addition, Respondent notes that because the only

error identified in state court was the admission of consensual touching of Homeboy when he was an adult to prove propensity, and that evidence was found to be alternatively admissible as evidence of intent, Poizner's trial did not contain multiple errors upon which a claim of cumulative error can be based. (*Id.*)

Poizner raised this claim in the petition for review he filed on direct appeal. (Lodgment No. 7.) That court denied the petition without citation of authority. (Lodgment No. 8.) Accordingly, this Court must "look through" to the state appellate court's opinion denying the claim as the basis for its analysis. *Ylst*, 501 U.S. at 805-06. That Court stated that "[o]ur rejection of [Poizner's] claims of substantive error, and conclusion that any assumed error was harmless, necessarily disposes of his claim of cumulative error. [Citations omitted.]" (Lodgment No. 6 at 36.)

Although Respondent is correct that there is no clearly established Supreme Court law finding cumulative error is a federal constitutional claim, the Ninth Circuit has held that such clearly established law exists. *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007). In *Parle*, the Ninth Circuit concluded that "[t]he cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Id.*, citing *Chambers*, 410 U.S. at 290, n. 3. As Respondent notes, only one error occurred at Poizner's trial, namely, the admission of consensual spanking as a sexual offense pursuant to Evidence Code § 1108. (Lodgment No. 6 at 20.) But the state court properly concluded this error was harmless because the evidence was alternatively admissible as evidence of "intent, common plan or scheme, or any of the other permissible inferences under [1108]." *Id.* Because multiple errors did not occur at Poizner's trial, no cumulative error occurred. The state court's resolution of this claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. *Williams*, 529 U.S. at 412-13.

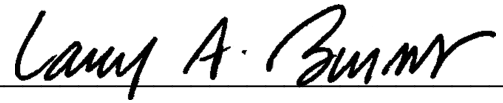
V. CONCLUSION

For the foregoing reasons, the Court concludes that Poizner is not entitled to federal habeas corpus relief. The Petition is **DENIED**. The Court also **DENIES** a

1 certificate of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v.*
2 *McDaniel*, 529 U.S. 473, 483-84 (2000).

3 **IT IS SO ORDERED.**

4 DATED: December 14, 2015

A handwritten signature in black ink, reading "Larry A. Burns", is written over a horizontal line.

5 Larry Alan Burns

6 UNITED STATES DISTRICT JUDGE
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